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Supreme Court, U.S.
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No. OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

THOMAS D. ARTHUR,

Petitioner,

—*v.*—

RICHARD F. ALLEN,
Commissioner, Alabama Department of Corrections, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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September 21, 2007

CAPITAL CASE

Questions Presented for Review

1. In light of the conflicting tests adopted by the Fifth, Sixth, Eighth, Ninth and Eleventh Circuits and the resulting patchwork of stays and dismissals in lethal injection cases across the country, what is the proper measure of timeliness for a method-of-execution claim brought by a death row inmate under 42 U.S.C. § 1983.

2. Whether the Eleventh Circuit's "unreasonable delay" standard violates Article III's case or controversy requirement where such standard: (i) ignores the fact that a method-of-execution claim does not become ripe until at least an execution date has been set or at the conclusion of federal habeas review; (ii) requires a death row inmate to anticipate the denial of habeas relief before such denial actually occurs; and (iii) subjects death row inmates to a catch-22 situation by forcing them to choose between filing an unripe claim or filing an unreasonably delayed claim.

3. Whether the balance of equities favors substantive review of Mr. Arthur's complaint where: (i) a trial from another case addressing the constitutionality of Alabama's lethal injection protocol will commence a few days after Mr. Arthur's execution; (ii) executing Mr. Arthur a few days before this trial commences risks imposing upon Mr. Arthur a method of execution that could be found unconstitutional; and (iii) the lethal injection protocols in numerous states have been found unconstitutional.

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OPINIONS BELOW

The August 10, 2007, Memorandum Opinion and Order of the United States District Court for the Southern District of Alabama dismissing Mr. Arthur's § 1983 claim ("Dismissal Order") is unreported and reprinted in the Appendix hereto at pages A1 - A13.

The September 17 2007, decision of the Eleventh Circuit affirming the District Court's dismissal ("Circuit Order") is unreported and reprinted in the Appendix hereto at pages A14 - A23.

JURISDICTION

This Court has jurisdiction under 28 U.S.C. § 1254(1). The Eleventh Circuit issued its decision on September 17, 2007. This Petition is timely filed.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article Three of the United States Constitution provides in relevant part:

> The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; —to all Cases affecting Ambassadors, other public Ministers and Consuls; —to all Cases of admiralty and maritime Jurisdiction; —to Controversies to which the United States shall be a Party;

> —to Controversies between two or more States; —between a State and Citizens of another State; —between Citizens of different States; —between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

U.S. Const. art. III, § 2, cl. 1.

The Eighth Amendment to the United States Constitution provides in relevant part: "[N]or [shall] cruel and unusual punishments [b]e inflicted." U.S. Const. amend. VIII.

The Fourteenth Amendment to the United States Constitution provides in relevant part: "No State shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1.

42 U.S.C. § 1983 provides in relevant part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party

> injured in an action at law, suit in equity, or other proper proceeding for redress[.]

STATEMENT OF THE CASE

A. Proceedings Below

After the conclusion of his federal habeas proceedings and before the Alabama Supreme Court set an execution date, Mr. Arthur commenced an action pursuant to 42 U.S.C. § 1983 (the "Complaint") challenging the constitutionality of the method by which Richard Allen, Grantt Culliver and other unknown employees and agents of the Alabama Department of Corrections (collectively, "the State of Alabama" or "the State") intend to execute him. Mr. Arthur sought injunctive and declaratory relief against the State of Alabama in order to prevent violations and threatened violations of his right to be free from cruel and unusual punishment under the Eighth and Fourteenth Amendments to the United States Constitution.

Without answering the Complaint, the State moved to dismiss on June 25, 2007, on various grounds pursuant to Rule 12 of the Federal Rules of Civil Procedure. On July 16, Mr. Arthur filed a Memorandum in Opposition to the State's motion, and the State's reply brief was filed on July 26, 2007. (A3)

In an order dated August 10, 2007, the District Court granted the State's motion to dismiss, holding that the State's affirmative defense of laches was dispositive. (A3) However, instead of applying a

conventional laches analysis, which would have required the State to demonstrate unreasonable delay and prejudice, the District Court relied on "specialized equitable principles" to dispose of Mr. Arthur's claims. (A11) The District Court did not define these principles, other than to state that the initial question is whether Mr. Arthur "unreasonably delayed," and that the State need not show undue prejudice because "the equitable principles in play here do not ignore prejudice, but find it, as a matter of law...." (*Id.*) Although Mr. Arthur did not ask for a stay, the District Court concluded that Mr. Arthur failed to overcome the "strong presumption" that he was not entitled to injunctive relief in the form of a stay, and dismissed the Complaint. (A3, A13)

On September 7, 2007, pursuant to a briefing schedule twice expedited at Mr. Arthur's request, Mr. Arthur filed his appellate brief. On September 17, 2007, the Eleventh Circuit issued an opinion, over a strongly worded dissent, affirming the District Court's dismissal. Instead of providing clarification regarding the proper standard for determining "undue delay" in a lethal injection challenge, the Eleventh Circuit held that actions are untimely when filed "too late to allow for a full adjudication of the merits of [a plaintiff's] action." (A22)

While acknowledging that "the equitable considerations in each case are naturally different" (A21), the Eleventh Circuit declined to remand to the District Court to develop a record to analyze relevant equitable considerations, instead summarily

concluding that "Arthur is unable to defeat the State's motion to dismiss." (A20)

In a compelling dissent, Judge Barkett criticized the "wholly unreasonable" requirement that death row inmates "predict[] scientific data—only recently available" (A21) suggesting that Alabama's lethal injection procedure violates the Eighth Amendment. Judge Barkett also rejected as "untenable" (A21) the suggestion that Mr. Arthur "should have anticipated the denial of all relief and filed his case prior to the determination" of his habeas appeals, noting that even the State of Alabama is "not so bold and therefore will not set an execution date until after the United States Supreme Court denies certiorari review. . . ." (A25) (Barkett, J., dissenting) (emphases in original).

Mr. Arthur now petitions for review of the Circuit Order.

B. Mr. Arthur's Trial and Federal Post-Conviction Proceedings

Mr. Arthur is a death row inmate at Holman Prison who has steadfastly maintained his innocence. He is scheduled to be executed by lethal injection on **September 27, 2007, at 6:00 p.m. CDT.**

In 1991, Mr. Arthur was convicted of murdering Troy Wicker at his home in Muscle Shoals, Alabama. No physical evidence linked Mr. Arthur to the crime. Instead, his conviction was based almost exclusively on the testimony of the victim's wife, Judy Wicker, who had previously testified that a burglar killed her husband. Judy

Wicker was convicted of and sentenced to life imprisonment for the same crime. *Wicker* v. *Alabama*, 433 So. 2d 1190 (Ala. Crim. App. 1983).

At her own trial, Judy Wicker testified that an intruder burglarized her home, assaulted her, and then shot Troy Wicker. *Wicker*, 433 So. 2d at 1192-94. A police officer who arrived at the crime scene testified that he had interviewed Judy Wicker and she told him that she had been raped. These sworn testimonies were corroborated by physical injuries Judy Wicker sustained from a struggle, blood-stained clothing, torn undergarment, and a rape kit that was prepared on the day of the murder. (T.R. 365-66)[1] At Mr. Arthur's trial, Judy Wicker changed her story, claimed that Mr. Arthur had pulled the trigger, and secured an early release from her life sentence. (T.R. 787)

Mr. Arthur's conviction and sentence were affirmed on direct appeal in 1998. Notwithstanding his diligent efforts, Mr. Arthur was unable to find counsel or access either state or federal collateral proceedings before both statutes of limitations had run. In order to overcome this procedural bar, Mr. Arthur—with the assistance of pro bono counsel he was finally able to find—diligently tried to develop

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[1] This was Mr. Arthur's third trial on the same charges. His two previous trials resulted in convictions and death sentences, which were overturned on direct appeal as a result of constitutional violations. "T.R. __" denotes references to the reporter's trial transcripts from the record of Mr. Arthur's third state trial.

facts relating to his gateway claim of actual innocence and his tolling claims.

In connection with federal habeas proceedings, Mr. Arthur requested discovery relating to actual innocence, and sought to conduct DNA testing for the first time on physical evidence, including a rape kit created on the day of the murder and blood-stained clothing. The district court denied Mr. Arthur's request for DNA testing, rejected his tolling claims, and dismissed his first and only habeas petition as time-barred on December 4, 2002. The Eleventh Circuit affirmed and the United States Supreme Court denied certiorari on April 16, 2007. Accordingly, Mr. Arthur stands to be executed without ever having received *any* post-conviction review—state or federal—on the merits of his claims.

On April 17, 2007, the State of Alabama moved to set an execution date for Mr. Arthur. On May 14, 2007, Mr. Arthur filed his Complaint in the United States District Court for the Southern District of Alabama. The Alabama Supreme Court granted the State's motion on June 22, 2007, and set an execution date of September 27, 2007.

C. Jurisdiction Below

The District Court had jurisdiction pursuant to 28 U.S.C. §§ 1331 and 1343. Jurisdiction in the Eleventh Circuit was proper under 28 U.S.C. §§ 1291 because Mr. Arthur appealed from the District Court's final judgment and denial of injunctive relief.

REASONS FOR GRANTING THE PETITION

I. This Court Should Grant Certiorari to Resolve the Circuit Split Regarding the Appropriate Standard for Determining the Timeliness of a § 1983 Lethal Injection Complaint.

In *Hill* v. *McDonough*, 126 S. Ct. 2096 (2006), the Supreme Court held that a death row inmate may bring an action seeking to enjoin the use of lethal injection to execute him under 42 U.S.C. § 1983. Hill filed his lawsuit four days before his scheduled execution. Although recognizing the "equitable powers" of federal courts to "dismiss suits they saw as speculative or filed too late in the day," the Court expressly noted that "the particular determinations made in those cases are not before" it. *Id.* at 2104. While *Hill* has left numerous substantive questions regarding the constitutionality of lethal injection in its wake, this Court has yet to settle the critical threshold question: what is the standard for determining the timeliness of a § 1983 method-of-execution complaint?

Since *Hill*, courts throughout the country have addressed the question of when a § 1983 lethal injection complaint is filed "too late in the day." However, without this Court's guidance, the federal courts have applied inconsistent standards, adding "another arbitrary factor into the equation of death," as one federal judge noted during the pendency of the *Hill* certiorari petition:

> [T]he dysfunctional patchwork of stays and executions going on in this country further undermines the various states' effectiveness and ability to properly carry out death sentences. We are currently operating under a system wherein condemned inmates are bringing nearly identical challenges to the lethal injection procedure. In some instances stays are granted, while in others they are not and the defendants are executed, with no principled distinction to justify such a result.

Alley v. *Little*, 447 F.3d 976, 977 (6th Cir. 2006) (Martin, J., dissenting from denial of rehearing en banc.)

The Eleventh, Eighth, Fifth, Ninth, and Sixth Circuits have adopted disparate standards of timeliness in deciding whether and when federal courts may dismiss § 1983 method-of-execution complaints. Mr. Arthur's case presents a critical opportunity for this Court to determine finally the appropriate standard for assessing timeliness.

A. The Eleventh Circuit Has Adopted an "Unreasonable Delay" Standard.

In affirming the Dismissal Order in this case, the Eleventh Circuit moved away from a traditional laches analysis, in which defendants are required to demonstrate "1) a delay in asserting a right or a claim, 2) that the delay was not excusable, and 3) that there was undue prejudice to the party against

whom the claim is asserted," *AmBrit, Inc.* v. *Kraft, Inc.*, 812 F.2d 1531, 1545 (11th Cir. 1986), in favor of undefined "specialized equitable principles." Instead of adhering to the well-established deferential Rule 12 standard, pursuant to which dismissal is "disfavor[ed]" and should be "rarely granted," *Lowrey* v. *Texas A&M Univ. Sys.*, 117 F.3d 242, 247 (5th Cir. 1997), and thereby concluded that the State could satisfy the affirmative defense of laches, the court cited applied the "unreasonable delay" concept it had developed in *Williams* v. *Allen*, No. 07-13638, 2007 U.S. App. LEXIS 19836 (11th Cir. Aug. 21, 2007), *Grayson* v. *Allen*, 491 F.3d 1318 (11th Cir. 2007), *Jones* v. *Allen*, 485 F.3d 635 (11th Cir. 2007), and *Rutherford* v. *McDonough*, 466 F.3d 970 (11th Cir. 2006). In so doing, the Eleventh Circuit did not consider the particularized facts of Mr. Arthur's case.

According to the Eleventh Circuit, "[i]n considering the dismissal of a lethal injection challenge, courts are to apply equitable principles which mandate dismissal" when a plaintiff has unnecessarily delayed in bringing his claim, "knowing full well that the discovery, evidentiary hearing, and decision on the merits that he demands could not possibly be accomplished within the short period of time between filing and the scheduled execution date." (A19 (internal quotation marks omitted)) The Eleventh Circuit did not, however, further clarify the proper standard for determining the timeliness of a lethal injection challenge, holding only that actions are untimely when filed "too late to allow for a full adjudication of the merits of [a plaintiff's] action." (A22)

Nor did the Eleventh Circuit consider that the time needed to hold evidentiary hearings and reach a decision on the merits varies among cases, and that courts, in their discretion, have the power to set schedules according to the exigencies of the cases. *See, e.g., Gen. Signal Corp.* v. *MCI Telecomms. Corp.*, 66 F.3d 1500, 1509 (9th Cir. 1995) ("district courts have discretion to impose rules to expedite completion of trials") (cited in *United States* v. *Edmond*, 52 F.3d 1080, 1100 (D.C. Cir. 1995) ("trial judge has wide discretion to adapt methods designed to expedite a trial")); *United States* v. *Pisani*, 773 F.2d 397, 403 (2d Cir. 1985). In fact, the State of Alabama has already completed discovery in another case involving issues similar to Mr. Arthur's. *See McNair v. Allen*, No. 06-695, 2006 U.S. Dist. LEXIS 78094 (M.D. Ala. Oct. 25, 2006).

Under the Eleventh Circuit's "unreasonable delay" standard, inmates such as Mr. Arthur are faulted for failing to file "in time," without receiving specific guidance as to when it is "too late" or being afforded any opportunity for fact-specific inquiries regarding the reasons for the alleged delay. Even if Mr. Arthur could show that he "had brought his suit in time to allow consideration of the merits," under the Eleventh Circuit's standard, "the strong presumption against a stay [would have] operate[d] against him" effectively rendering such presumption to be irrebuttable. (A21)[2]

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[2] Similarly, the Fifth and Eighth Circuits have applied a "strong equitable presumption" against the grant of a stay. *See*

B. The Ninth Circuit Has Adopted a Fact-Specific Inquiry.

In contrast to the Eleventh Circuit (and the Fifth and Eighth Circuits), in deciding the timeliness of a lethal injection challenge, the Ninth Circuit has rejected the general application of a "strong equitable presumption" and instead has adopted a fact-specific inquiry.

In *Beardslee* v. *Woodford*, 395 F.3d 1064, 1069-70 (9th Cir. 2005) (per curiam), the Ninth Circuit held that the district court erred in denying a stay solely because plaintiff did not file until execution was imminent. The district court had applied such presumption "solely on the basis" that plaintiff "had not filed the case until the California Supreme Court lifted its stay of execution." *Id.* at 1069. Plaintiff had filed his § 1983 complaint one month before his scheduled execution. According to the district court, because plaintiff's commencement of his action was "so close to his execution date . . . , litigation through trial is impossible unless the [c]ourt agree[d] to stay the pending execution." *Beardslee* v. *Woodford*, No. 04-5381, 2005 U.S. Dist. LEXIS 144, at *5 (N.D. Cal. Jan. 7, 2005). The district court also found that "virtually all of the

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Reese v. *Livingston*, 453 F.3d 289, 291 (5th Cir. 2006) ("a plaintiff cannot wait until a stay must be granted to enable [him] to develop facts and take the case to trial"); *Nooner* v. *Norris*, 491 F.3d 804, 809 (8th Cir. 2007) (proper inquiry is "whether [the plaintiff] could have brought his claim at such a time as to allow consideration of the merits without requiring entry of a stay") (internal quotation marks omitted).

evidence that [p]laintiff proffer[ed] here became available while a stay of execution was in place so that [p]laintiff could pursue his federal habeas corpus petition, long before" he filed his lethal injection complaint. *Id.* Rejecting the district court's finding of undue delay, the Ninth Circuit noted that "[o]nce an execution was imminent," plaintiff "acted promptly," and "pursued his claims aggressively as soon as he viewed them as ripe." 395 F.3d at 1069.

Rather than "applying a general rule that a claim was dilatory if first filed at the time when the possibility of execution became imminent," the Ninth Circuit held that "the district court should have conducted a fact-specific inquiry to ascertain whether the claims could have been brought earlier, and whether the petitioner had good cause for delay." *Id.* at 1070. Such a "fact-specific inquiry" conflicts with the approach adopted by the Fifth, Eighth, and Eleventh Circuits. *White* v. *Johnson*, 429 F.3d 572 (5th Cir. 2005); *Nooner*, 491 F.3d 804; *Grayson*, 491 F.3d 1318.

C. The Sixth Circuit Has Adopted a Statute-of-Limitations Rule.

Instead of adopting any equitable standards, the Sixth Circuit has adopted a statute-of-limitations rule to determine the timeliness of § 1983 method-of-execution claims, holding that such claims accrue upon the conclusion of an inmate's direct appeal of

his conviction. *Cooey* v. *Strickland*, 479 F.3d 412, 422 (6th Cir. 2007).[3]

Cooey's statute-of-limitations analysis is misguided for a number of reasons. Unlike the "classic" case of tort injury based upon harm that has already occurred, death row inmates filing method-of-execution claims seek injunctive relief against the harm that will be inflicted upon them *in the future* by the allegedly unconstitutional lethal injection protocols they seek to challenge.

As explained by Judge Gilman's dissent in *Cooey*, the majority's reasoning was flawed:

> To require a petitioner to file a § 1983 action three to five years before his or her execution in order to obtain legal review of the lethal-injection protocol strikes me as counterintuitive, unduly harsh, and just plain wrong. . . . Moreover, both the petitioners and the courts will have to manage the cognitive dissonance and inefficiency of simultaneously deciding (1) habeas petitions attacking the validity of the conviction and sentence, and (2) § 1983 actions challenging the constitutionality of the procedure used to carry out the sentence. The majority will thus force death-sentenced prisoners to pursue their habeas claims that assert their

[3] A petition for certiorari filed by the plaintiff if *Cooey* is pending.

> lack of culpability or, in some instances, their actual innocence, while simultaneously implying their guilt by requesting that the sentence imposed upon them be carried out in a constitutionally compliant manner.

479 F.3d at 429 (Gilman, J., dissenting).

While the Sixth Circuit had adopted a statute-of-limitations rule that calculates the period from the conclusion of direct review to the date on which the lethal injection complaint is filed, the standards adopted by the Fifth, Eighth and Eleventh Circuits are based upon the amount of time that remains before an inmate will be executed—a date that is subject to change and uncertainty.

In sum, the legal landscape for § 1983 lethal injection challenges consists of an inconsistent patchwork of stays and dismissals. This Court should grant certiorari to establish the appropriate measure for timeliness.

II. The Eleventh Circuit's "Unreasonable Delay" Standard Contravenes Article III's Case or Controversy Requirement.

Under the Eleventh Circuit's "unreasonable delay" standard, "waiting until the Supreme Court has denied certiorari review of a federal habeas petition or even until a certiorari petition has been pending for over three months . . . or until after the state files a motion to set the execution date is too late to avoid the inevitable need for a stay of execution and is too late to allow for a full

adjudication of the merits of his action." (A22) (internal quotations marks and citations omitted) Although the Eleventh Circuit has not yet decided precisely when a § 1983 method-of-execution claim becomes ripe, its "unreasonable delay" standard runs afoul of Article III's case or controversy requirement.

The "ripeness doctrine is drawn both from Article III limitations on judicial power and from prudential reasons for refusing to exercise jurisdiction." *Reno* v. *Catholic Soc. Servs. Inc.*, 509 U.S. 43, 57 n.18 (1993). It is a justiciability doctrine designed to "prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements . . . ." *Nat'l Park Hospitality Ass'n* v. *Dep't of the Interior*, 538 U.S. 803, 807-08 (2003), quoting *Abbott Labs.* v. *Gardner*, 387 U.S. 136, 148 (1967). "Justiciability concerns not only the standing of litigants to assert particular claims, but also the appropriate timing of judicial intervention." *Renne* v. *Geary*, 501 U.S. 312, 320 (1991). "A claim is not ripe for adjudication if it rests upon contingent future events that may not occur as anticipated, or indeed may not occur at all." *Texas* v. *United States*, 523 U.S. 296, 300 (1998) (internal quotation marks omitted). "One does not have to await the consummation of threatened injury to obtain preventive relief. If the injury is *certainly impending*, that is enough." *Thomas* v. *Union Carbide Agric. Prods. Co.*, 473 U.S. 568, 581 (1985) (internal quotation marks omitted) (quoting *Reg'l Rail Reorganization Act Cases*, 419 U.S. 102, 143 (1974)) (emphasis added).

Mr. Arthur's injury will not occur until he is executed and thus his method-of-execution claim is not ripe for review until his execution is "certainly impending." *See Thomas*, 473 U.S. at 581. In connection with federal habeas proceedings, Mr. Arthur sought to vacate his conviction and death sentence. It was not until that litigation came to an unsuccessful close with this Court's denial of certiorari that his execution by lethal injection became imminent. Mr. Arthur filed his claim less than a month after it became ripe and before the Alabama Supreme Court set his execution date. *See Stewart* v. *Martinez-Villareal*, 523 U.S. 637, 643 (1998) (motion for determination of competency to be executed are "unquestionably ripe" when a warrant for execution issues).

As the Eleventh Circuit has recognized, "[i]t is common practice in Alabama for the State to seek an execution date soon after the Supreme Court denies certiorari review of an inmate's federal habeas petition." *Jones*, 485 F.3d at 640 n.2. Because the State of Alabama routinely waits until such time to set an execution date, Mr. Arthur had no reason to believe that his execution was imminent before a date had been set. As Judge Barkett noted in her dissent, "the suggestion that the petitioner 'should have anticipated the denial of all relief" prior to this Court's denial of certiorari and should have filed a § 1983 complaint prior to this Court's final determination is "untenable." (A24) (emphasis in original). Moreover, the courts below improperly applied hindsight in dismissing the possibility of a grant of certiorari by this Court. The death penalty

was the subject of seven of the 68 opinions issued by this Court last Term; in six of the seven, the Court granted relief to petitioners.[1]

The Eleventh Circuit's "unreasonable delay" standard forces Mr. Arthur into a Catch-22 situation: file a method-of-execution claim before it is ripe and risk dismissal for lack of standing, or file such a claim when it becomes ripe and risk dismissal for unreasonable delay. Another equally senseless consequence of such standard is that similarly situated death row inmates would be required to litigate simultaneously their conviction and sentencing issues in this Court and pursue their method-of-execution claims in the district courts. This is especially true if, as the District Court held

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[1] *Panetti* v. *Quarterman*, 127 S. Ct. 2842 (2007) (reversing judgment and remanding to allow the district court the initial opportunity to resolve the petitioner's Eighth Amendment claim); *Uttecht* v. *Brown*, 127 S. Ct. 2218 (2007) (reversing Court of Appeals decision and reinstating death sentence); *Brewer* v. *Quarterman*, 127 S. Ct. 1706 (2007) (granting habeas relief to allow jury to respond to mitigating evidence and weigh such evidence in deciding whether the death penalty was truly deserved); *Smith* v. *Texas*, 127 S. Ct. 1686 (2007) (reversing and remanding where state appellate court erred in applying federal law to review of state habeas decision); *Abdul-Kabir* v. *Quarterman*, 127 S. Ct. 1654 (2007) (remanding for further proceedings where there was a reasonable likelihood that the state trial court's instructions prevented jurors from giving meaningful consideration to constitutionally relevant mitigating evidence); *Ayers* v. *Belmontes*, 127 S. Ct. 469 (2006) (reinstating death sentence where jury instruction did not on its face restrict consideration of post-crime mitigating evidence).

here, the period for determining "unreasonable delay" is triggered when other inmates in the same state begin filing lethal injection suits, irrespective of the procedural posture of the plaintiff's own case. (A6-7)

Panetti v. *Quarterman*, 127 S. Ct. 2842 (2007), one of the seven death penalty opinions issued by this Court last Term, illustrates the flaw in the Eleventh Circuit's "unreasonable delay" standard. Scott Panetti was convicted of capital murder and sentenced to death despite his well-documented history of mental illness. 127 S. Ct. at 2849. In the course of his initial state and federal habeas proceedings, Panetti did not argue that mental illness rendered him incompetent to be executed under *Ford* v. *Wainwright*, 477 U.S. 399 (1986), but raised this claim for the first time six weeks after his execution date had been set. *Id.* The district court denied the application on the merits and the Fifth Circuit affirmed. *Id.* at 2851-52. The state argued that the district court lacked jurisdiction to adjudicate Panetti's *Ford* claim because he failed to raise it in his first federal habeas application. This Court squarely rejected that argument, stating that its "implications for habeas practice would be far reaching and seemingly perverse." *Id.* (internal quotation marks and citation omitted). This is because:

> A prisoner would be faced with two options: forgo the opportunity to raise a *Ford* claim in federal court; or raise the claim in a first federal habeas

> application . . . , even though it is premature. The dilemma would apply not only to prisoners with mental conditions indicative of incompetency but also to those with no early sign of mental illness. All prisoners are at risk of deteriorations in their mental state. As a result, conscientious defense attorneys would be obliged to file unripe (and in many cases, meritless) *Ford* claims in each and every § 2254 application. This counterintuitive approach would add to the burden imposed on courts, applicants, and the States, with no clear advantage to any.

Id. at 2852-53.

This rationale applies with equal force to the method-of-execution claims being raised around the country. All prisoners on death row are *at risk* of being executed at some point in the future, but until an inmate is certain that he will be executed, *i.e.*, when no obstacles prevent the state from enforcing its death sentence, there is no sense in filing a method-of-execution claim. "Instructing prisoners to file premature claims, particularly when many of these claims will not be colorable even at a later date, does not conserve judicial resources, 'reduc[e] piecemeal litigation,' or 'streamlin[e] federal habeas proceedings.'" *Panetti*, 127 S. Ct. at 2854 (quoting *Burton* v. *Stewart*, 127 S. Ct. 793, 797 (2007) (per curiam)).

Ripeness concerns for *Ford*-based incompetency claims are indistinguishable from the ripeness concerns for method-of-execution claims, because both raise Eighth Amendment challenges to a future injury that will occur only *at the time of execution*. Because Alabama, like many states, has the discretion to change its execution protocol secretly and without notice, any judgment about the constitutionality of a given protocol would be irrelevant if, in the interim, the State could change the protocol to be used to execute the inmate—just as a judgment regarding an inmate's competency to be executed well before his execution is imminent would be irrelevant. The Eleventh Circuit's "unreasonable delay" standard, which compels death row inmates to litigate method-of-execution claims—before they are certain that they will be executed at all, let alone have any knowledge of the actual protocol to be used—must be rejected for the same reasons this Court rejected the State's arguments in *Panetti*.

III. The Balance of the Equities Favors Substantive Review of Mr. Arthur's Challenge to Alabama's Lethal Injection Protocol.

Even if "specialized equitable principles" may be applied at the initial pleading stage to a death row inmate's § 1983 lethal injection challenge, the balance of such equities favors substantive review of Mr. Arthur's claims. A fair and proper consideration of equitable principles as grounds for dismissal of an otherwise valid claim requires consideration not only of the factors weighing in favor of dismissal, but also

of those factors weighing in favor of proceeding to a decision on the merits of the claim. *See, e.g.*, *Blum* v. *Caldwell*, 446 U.S. 1311, 1315 (1980) (Marshall, J.) (requiring justices to "balance the equities to determine on which side the risk of irreparable harm weighs most heavily" when considering an application for a stay pending resolution of a writ of certiorari); *Texaco Puerto Rico, Inc.* v. *Dep't of Consumer Affairs*, 60 F.3d 867, 878 (1st Cir. 1995) ("[A]n equitable factor must always be weighed in concert with other relevant factors. Moreover, as part of balancing the equities, the court looks at the conduct of both parties and the potential hardships that might result from a judicial decision either way.") (internal punctuation and citation omitted).

The issues at stake in this litigation are unquestionably important to Mr. Arthur, who stands to be executed pursuant to a protocol that he believes will result in an excruciatingly painful death—as confirmed by numerous courts. These issues should be resolved before Mr. Arthur is executed by the same means he challenges as being cruel and unusual punishment. It is beyond dispute that the State of Alabama has no valid interest in violating Mr. Arthur's constitutional rights.

A. Mr. Arthur Should Receive the Benefit of Imminent Review of and Potential Improvements to Alabama's Lethal Injection Protocol.

After Mr. Arthur filed his brief in the Eleventh Circuit, on September 7, 2007, an Alabama legislative panel approved a contract between the

Alabama Office of the Attorney General and Dr. Mark Dershwitz, a University of Massachusetts professor of anesthesiology. Under the terms of the contract, Dr. Dershwitz will review the chemical composition of drugs administered to state capital murder defendants during the execution process. The contract shall be in effect from the later of October 1, 2007 or the date of final approval by the Governor until on or before September 30, 2009. (A31, A37)

Mr. Arthur should be able to benefit, just as a prisoner with a later execution date would, from any improvements that the State of Alabama may make to its lethal injection protocol following Dr. Dershwitz's review.

Similarly, a § 1983 challenge to Alabama's lethal injection protocol brought by two other Alabama death row inmates, Willie McNair and James Callahan, is scheduled for trial on the merits in the United States District Court for the Middle District of Alabama beginning October 3, 2007. *See* Order, *McNair* v. *Allen* and *Callahan* v. *Allen*, Case Nos. 06-CV-695-WKW and 06-CV-919-WKW (M.D. Ala. Sept. 7, 2007) (A26-29). This trial will resolve for the first time the constitutionality of the lethal injection process as applied in Alabama. With the benefit of the factual exposition of McNair's and Callahan's claims at hand, resolution of Mr. Arthur's substantially similar claims will likely be able to proceed quickly. In addition, executing Mr. Arthur only days before the same issue that he raises in his own § 1983 Complaint receives long-awaited judicial

scrutiny risks imposing on Mr. Arthur a sentence that could very soon be held unconstitutional.

B. Mr. Arthur's Claim Has a Strong Likelihood of Success on the Merits.

Mr. Arthur has also demonstrated a strong likelihood of success in showing that Alabama's lethal injection protocol requires modifications in order to pass constitutional muster. Federal courts across the nation have granted a variety of forms of relief on similar claims brought by death row inmates.

For example, in *Morales* v. *Hickman*, 415 F. Supp. 2d 1037, 1046-48 (N.D. Cal. 2006), Judge Fogel held that there was undue risk that Morales would still be conscious following the administration of the anesthetic, and that California could proceed with his execution only if it either employed anesthesiologists to ensure that Morales was unconscious and remained unconscious, or used only sodium thiopental or another barbiturate or combination of barbiturates, during the execution process. The Ninth Circuit affirmed, holding that the district court did not abuse its discretion in fashioning an appropriate remedy. *Morales* v. *Hickman*, 438 F.3d 926, 931 (9th Cir. 2006).

Anderson v. *Evans* provides another example of a successful § 1983 action challenging the constitutionality of lethal injection. *Anderson* v. *Evans*, No. CIV-05-0925-F, 2006 WL 83093 (W.D. Okla. Jan. 11, 2006). The *Anderson* court denied the Oklahoma Department of Corrections' motion to

dismiss, finding that its protocol created an excessive risk of substantial injury or deprivation. 2006 WL 83093, at *4.

In *Brown* v. *Beck*, No. 5:06-CT-3018-H, 2006 U.S. Dist. LEXIS 60084, at *25 (E.D.N.C. Apr. 7, 2006), *aff'd*, 445 F.3d 752 (4th Cir. 2006) the court denied Brown's motion for a preliminary injunction, but required North Carolina to ensure that "there are present and accessible to Plaintiff throughout the execution personnel with sufficient medical training to ensure that Plaintiff is in all respects unconscious prior to and at the time of the administration of any pancuronium bromide or potassium chloride." North Carolina revised its execution protocol to address the court's concerns and Beck was executed pursuant to the revised protocol. *See also Patton v. Jones*, 193 Fed. Appx. 785, 789-90 (10th Cir. 2006) (affirming dismissal of inmate's § 1983 action, but noting that defendants allayed plaintiff's concern by "revising the protocol during the pendency of this appeal to require the personnel carrying out an execution to wait two and one-half minutes after the injection of the anesthetic before proceeding to inject the remaining two drugs called for in the protocol").

In addition, lethal injection is currently or was previously suspended in California, Delaware, Florida, Maryland, Missouri, North Carolina, South Dakota and Tennessee. *See Morales* v. *Tilton*, 465 F. Supp. 2d 972, 981 (N.D. Cal. 2006); *Jackson v. Taylor*, No. 06-300-SLR, 2006 WL 1237044 (D. Del. May 9, 2006) (enjoining execution until further order); *Jackson* v. *Danberg*, 240 F.R.D. 145 (D. Del.

2007) (certifying a class of all current and future death-sentenced prisoners in the custody of the Delaware Department of Corrections); Fla. Exec. Order No. 260 (Dec. 15, 2006) (no further death warrants will be signed until after a commission on lethal injection issues findings and the Department of Corrections makes necessary revisions); *Taylor v. Crawford*, 457 F.3d 902, 903-04 (8th Cir. 2006) (detailing finding by district court that Missouri's lethal injection protocol was unconstitutional), *appeal after remand*, No. 06-3651, 2007 U.S. App. LEXIS 12851 (8th Cir. June 4, 2007) (concluding revised lethal injection protocol is constitutional); *Berger Again Calls on Governor to Act*, US Fed. News, Apr. 3, 2007, available at 2007 WLNR 6835155 (de facto moratorium in North Carolina); Katie Brown, *Death Penalty Measure Signed*, RAPID CITY J., Feb. 27, 2007 (referencing South Dakota's new death penalty law, effective July 1, 2007, after which executions may resume); Order, *Harbison v. Little*, No. 3:06-CV-01206 (M.D. Tenn. Sept. 19, 2007) (finding Tennessee's lethal injection protocol in violation of the Eighth Amendment).

In 2007 alone, the lethal injection protocols in Florida, California, Tennessee and Georgia have been modified in response to identified constitutional infirmities. *See* Florida Dep't of Corrections, Execution by Lethal Injection Procedures (effective Aug. 1, 2007); State of California San Quentin Operational Procedure Number 0-770 Execution by Lethal Injection (revised May 15, 2007); Georgia Dep't of Corrections Lethal Injection Procedure (effective June 7, 2007); *see also* Tenn. Dep't of

Correction Execution Procedures for Lethal Injection (revised April 30, 2007). These modifications suggest that the lethal injection process in Alabama is also likely prone to unconstitutional error in its administration.

Although the end of Mr. Arthur's collateral appeals brought to a close his right to challenge his confinement and the validity of his sentence, it did not relieve the State of Alabama of its responsibility to carry out his sentence of death in a manner consistent with Eighth and Fourteenth Amendments. The Eleventh Circuit's refusal to consider the merits of Mr. Arthur's claims deprives Mr. Arthur of his right to vindicate his interest in these bedrock constitutional principles.

CONCLUSION

For the foregoing reasons, the Court should grant a writ of certiorari and reverse the decision of the Court of Appeals for the Eleventh Circuit with respect to the questions presented herein.

Respectfully submitted,

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September 21, 2007

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

THOMAS D. ARTHUR	)	
	)	
Plaintiff,	)	
v.	)	CIVIL ACTION 07-0342-WS-C
	)	
RICHARD ALLEN, etc., et al.,	)	
	)	
Defendants.	)	

ORDER

This matter is before the Court on the defendants' motion to dismiss. (Doc. 15). The plaintiff has filed a response and the defendants a reply, (Docs. 17, 18), and the motion is ripe for resolution. After carefully considering the foregoing and other relevant materials in the file, the Court concludes that the motion to dismiss is due to be granted.

The salient, undisputed facts are these: In January 1992, the plaintiff was sentenced to death (for the third time) for a murder committed in 1982. His conviction and sentence became final in approximately June 1998, and his state collateral proceedings became final in May 2002.

In July 2002, Alabama adopted lethal injection as its method of execution, applicable to all existing death row inmates who did not opt for electrocution within thirty days. The plaintiff did not opt for electrocution.

The plaintiff filed a federal habeas petition in April 2001, which the trial court dismissed as untimely in December 2002. The Eleventh Circuit affirmed in June 2006, which opinion was modified slightly on petition for rehearing and rehearing en banc in August 2006. The dismissal of the plaintiff's federal habeas petition became final on April 16, 2007, when the Supreme Court denied his petition for writ of certiorari. The state filed a motion to set an execution date the next day. The Alabama Supreme Court granted the motion on June 22, 2007, setting an execution date of September 27, 2007.

The plaintiff filed this Section 1983 action on May 14, 2007, challenging the constitutionality of Alabama's lethal injection protocol, in particular its use of a three-drug sequence including a short-acting anesthetic (sodium pentothal), a drug inducing muscle paralysis (pancuronium bromide), and a final, lethal drug (potassium chloride); its procedures (or lack thereof) for their administration; and its standards (or lack thereof) for persons involved in the execution process. All allegations concerning the protocol are made "upon information and belief." The plaintiff seeks to "enjoin Defendants from executing Plaintiff with inadequate anesthesia and execution procedures that violate the Eighth Amendment prohibition against cruel and unusual punishment." (Doc. 1).

The defendants do not dispute that the plaintiff's claim is properly characterized as a challenge to the conditions of confinement under Section 1983 and not as a successive habeas petition. *See generally Hill v. McDonough*, 126 S. Ct. 2096 (2006) (holding that a challenge to Florida's three-drug lethal injection protocol could be brought under Section

1983). Instead, they argue that the plaintiff's claim: (1) is barred by the statute of limitations; (2) is barred by the doctrine of laches; and (3) fails to state a claim upon which relief can be granted. Because it is dispositive, the Court addresses only the second of these arguments.

"Injunctive relief is an equitable remedy that is not available as a matter of right." *Grayson v. Allen*, 2007 WL 2027903 at *3 (11th Cir.), *cert. denied*, 2007 WL 2086662 (2007). When the equitable relief sought is a stay of execution, sensitivity to the state's "strong interest in enforcing its criminal judgments without undue interference from the federal courts" requires the federal courts to "apply a strong equitable presumption against the grant of a stay where a claim could have been brought at such a time as to allow consideration of the merits without requiring entry of a stay." *Jones v. Allen*, 485 F.3d 635, 638 (11th Cir.) (internal quotes omitted), *cert. denied*, 127 S.Ct. 2160 (2007). The same equitable principles, and the same strong presumption, obtain when the equitable relief sought is an injunction. *Grayson*, 2007 WL 2027903 at *3; *accord Rutherford v. McDonough*, 466 F.3d 970, 976 (11th Cir.) ("*Rutherford II*"), *cert. denied*, 127 S.Ct. 465 (2006).

The initial question, then, is whether the plaintiff "unreasonably delayed" in filing this action. *Grayson*, 2007 WL 2027903 at *3, *6. There are at least four possibilities for excusing the plaintiff's delay of almost five years following Alabama's adoption of lethal injection as its method of

execution,[1] but none of them could suffice to defeat the defendants' motion to dismiss.

First, the plaintiff could plead reasonable ignorance of Alabama's lethal injection protocol. In this regard, the complaint alleges that, "[u]pon information and belief, Alabama's execution procedures are deemed confidential, and the Defendants will not publicly disclose any details about the procedures involved in carrying out executions in Alabama." (Doc. 1 at 6, ¶ 19).[2]

The Eleventh Circuit, however, has rejected the proposition that the confidentiality of the protocol excuses a plaintiff's delay, for reasons largely present here. As in *Jones*, any assertion of reasonable ignorance "is belied by [the plaintiff's] complaint, which alleges 'upon information and belief" that Alabama uses the three-drug cocktail; "[t]hus, [the plaintiff] knew of the basis of his claim before he filed his complaint." 485 F.3d at 640 n.3.[3] Also as in

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[1] There may be others (such as, perhaps, a sufficiently debilitating physical or mental condition), but the plaintiff asserts none. Indeed, he does not clearly assert any of the four possibilities discussed in text, but the Court addresses them because they appear in recent Eleventh Circuit opinions.

[2] Notably, the complaint does not allege that, despite the protocol's confidential nature, the plaintiff and his counsel were until recently ignorant about it. Likewise, the plaintiff in brief describes the protocol as "secretive" and asserts that the state "refuses to provide even the most basic information about these procedures," but he does not assert that he was unable to obtain this information through other means. (Doc. 17 at 11-12).

[3] As in *Jones*, *id.*, despite general allegations about staffing and training, the "crux" of the plaintiff's complaint is that the

Jones, the plaintiff "knew or should have known before 2006 that the State uses the same three-drug cocktail as nearly every other state where substantially similar challenges have been made." *Id.* The plaintiff should have known this from the published report, in February 2006, that of the 37 states employing lethal injection, 35 used the same three-drug cocktail. *Evans v. Saar*, 412 F. Supp. 2d 519, 522 (D. Md. 2006). As discussed below, the ingredients of that cocktail had been identified in *Evans* and numerous other published opinions before 2007.

The *Grayson* Court followed *Jones*, concluding that allegations in the complaint substantively identical to those in *Jones* and this case "belied" the plaintiff's "assertion that he was unaware of Alabama's three-drug protocol." 2007 WL 2027903 at *5 & n.3. The *Grayson* Court also concluded that, since the plaintiff's allegations were based "on information and belief" rather than knowledge, "there is no reason why [he] could not have filed a similar § 1983 complaint based 'upon information and belief months, if not years, earlier." *Id.* Because this plaintiff pleads based on information and belief, *Grayson's* reasoning applies here as well.

The plaintiff's case for reasonable ignorance is even weaker than that of the plaintiffs in *Jones* and *Grayson*. As he acknowledges, (Doc. 17 at 13), a number of Alabama cases substantively similar to the plaintiff's were filed in 2006. Each of them contains the allegation that Alabama employs the

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cocktail runs an unacceptable risk of causing the execution to be accompanied by agonizing pain and conscious suffocation.

same three-drug cocktail the plaintiff now alleges. *McNair v. Allen*, 2:06-cv-696-WKW (M.D. Ala.) (filed August 7, 2006); *Callahan v. Allen*, 2:06-cv-919-WKW (M.D. Ala.) (filed October 11, 2006); *Jones v. Allen*, 2:06-cv-1032-MHT (M.D. Ala.) (filed November 1, 2006); *Grayson v. Allen*, 2:06-cv-1032-WKW (M.D. Ala.) (filed November 17, 2006). If the plaintiffs in these cases were able to make this allegation in the summer and fall of 2006, there can be no good reason the plaintiff here could not have made the same allegation long before May 2007. *See Hill v. McDonough*, 464 F.3d 1256, 1259 (11th Cir.) (given that a fellow prisoner had challenged Florida's lethal injection protocol years before, "Hill cannot claim that it was impossible for him to initiate his federal suit any earlier."), *cert. denied*, 127 S.Ct. 465 (2006). Even assuming that the plaintiffs in these cases had access to sources that this plaintiff did not, once the complaints were filed they were publicly available online, and little effort would have been required to locate them through the CM/ECF system. At least after *Hill* was handed down in June 2006, there was every incentive to do so.[1]

A second possible basis for excusing the plaintiff's delay would be reasonable ignorance that Alabama's protocol is potentially subject to constitutional challenge. The plaintiff makes no such argument, and it would not succeed if he did. By 2004, there were at least four published cases raising the same challenges to the three-drug protocol as the plaintiff

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[1] The plaintiff has been represented by current counsel since at least September 2002. *Arthur v. Haley*, 2:01-cv-00983 (N.D. Ala.) (Doc. 50).

mounts. *See Jones v. Allen*, 483 F. Supp. 2d 1142, 1153 (M.D. Ala. 2007) (citing *Cooper v. Rimmer*, 358 F.3d 655 (9th Cir. 2004); *Harris v. Johnson*, 376 F.3d 414 (5th Cir. 2004); *State v. Webb*, 750 A.2d 448 (Conn. 2000); and *Sims v. State*, 754 So. 2d 657 (Fla. 2000)). The Eleventh Circuit in *Jones* held that these four cases were sufficient to support a finding that the plaintiff was or should have been aware of the risks of the cocktail and of a potential challenge to the procedure "well before he filed suit" in November 2006. 485 F.3d at 640 n.3.[5]

The four cases cited in *Jones* are only the tip of the iceberg. What follows is a sampling of opinions articulating plaintiffs' arguments similar to those the plaintiff raises here that were published prior to *Hill* (a comparable list of unpublished opinions can be located online with dizzying speed): *Taylor v. Crawford*, 445 F.3d 1095, 1097 (8th Cir. 2006); *Rutherford v. Crosby*, 438 F.3d 1087, 1094 (11th Cir. 2006) ("*Rutherford II*"); *Morales v. Hickman*, 438 F.3d 926, 927 (9th Cir. 2006); *In re: Williams*, 359 F.3d 811, 814 (6th Cir. 2004) (Suhrheinrich, J., concurring); *Robinson v. Crosby*, 358 F.3d 1281, 1285 n.4 (11th Cir. 2004); *Cooey v. Taft*, 430 F. Supp. 2d 702, 706-07 (S.D. Ohio 2006); *Crowe v. Head*, 426 F. Supp. 2d 1310, 1353 (N.D. Ga. 2005); *Bell v. True*, 413 F. Supp. 2d 657, 736 (W.D. Va. 2006); *Evans v. Saar*, 412 F. Supp. 2d 519, 521 (D. Md. 2006); *Reid v. Johnson*, 333 F. Supp. 2d 543, 548 (E.D. Va. 2004); *Bieghler v. State*, 839 N.E.2d 691, 695 (Ind. 2005); *Abdur'Rahman v. Bredesen*, 181 S.W.2d 292, 302

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[5] The *Jones* Court did not require any showing that the plaintiff or his counsel were actually aware of these cases.

(Tenn. 2005); *Ex parte O'Brien*, 190 S.W.2d 677, 678 (Tex. Crim. App. 2006) (Cochran, J., concurring). A fair number of these cases identified experts supporting the plaintiffs' claims. The volume of cases raising challenges similar to the plaintiff's naturally rose following *Hill*, including the four filed in the Middle District of Alabama within a few months thereafter. Indeed, *Hill* standing alone strips away any argument of reasonable ignorance of a possible constitutional challenge, since it repeated the standard allegations concerning the three-drug cocktail in a national forum. 126 S. Ct. at 2100.

A third argument for excusing the plaintiff's delay would be that he could not pursue his claim before *Hill* was decided, since Eleventh Circuit precedent held that such a claim could be maintained only under Section 2254. The plaintiff does not make this argument, and the *Grayson* Court rejected it on two grounds, both applicable here. First, nothing precluded the plaintiff from filing suit to challenge the Eleventh Circuit rule, as indeed the *Hill* plaintiff did. Second, even if pre-*Hill* delay could be excused by the adverse appellate precedent, the *Grayson* plaintiff delayed five more months after *Hill* was decided, and ten months after certiorari was granted. 2007 WL 2027903 at *4. The plaintiff here, who filed suit more than six months after the plaintiff in *Grayson*, can fare no better than his predecessor.

Finally, a plaintiff could argue (though the plaintiff has not) that it would have been premature to file suit before the denial of his habeas petition became final upon the denial of certiorari. The Eleventh Circuit has declined to determine precisely when such a suit becomes ripe, but it has clearly rejected the notion that denial of certiorari is

required. On the contrary, the *Jones* Court stated that, "given the extremely small chance of securing certiorari review ..., it was all but guaranteed that [the plaintiff] would die by lethal injection" once the appellate court denied relief. 485 F.3d at 639 n.2. That date arrived in this case in August 2006, some nine months before the plaintiff filed suit.

In light of the above, it is clear that the plaintiff unreasonably delayed in filing this action. The second question that must be answered in determining if a "strong presumption" against a stay should be applied is whether the plaintiff's claim "could have been brought at such a time as to allow consideration of the merits without requiring entry of a stay." Assuming without deciding that the same question must be answered when the plaintiff seeks not a stay but injunctive relief, the answer is plainly in the affirmative. The latest date on which the plaintiff's unreasonable delay began (and this requires the generous assumption that the plaintiff remained reasonably ignorant of Alabama's three-drug cocktail until fellow Alabama prisoners began filing suit) is on or shortly after August 7, 2006. The plaintiff's scheduled execution date is September 27, 2007, over a year later. Discovery, the dispositive motions and/or evidentiary hearing that would ensue, the Court's ultimate ruling, and any appeal thereof, could have been accomplished within this time frame. *See Rutherford II*, 466 F.3d at 974 (court considers the time needed for "discovery, evidentiary hearing, and decision on the merits"); *Jones*, 485 F.3d at 639 n.2 (court considers the time needed for appeal).

Because the plaintiff unreasonably delayed in bringing this action, and because, but for that delay,

his claim could have been resolved on the merits without impacting his scheduled execution date, the Court must indulge a "strong presumption" against the grant of injunctive relief. It is incumbent upon the plaintiff to overcome this presumption, but he has not attempted to do so.

The circumstances of this case in fact bolster, rather than mitigate, the presumption. First, the plaintiff's unreasonable delay has made the difference in whether or not his claim can be resolved on the merits before his scheduled execution date. By delaying his suit until May 2007, the plaintiff left an impossibly short four months for the entire process.[6] The plaintiff's unreasonable delay is thus far from harmless.

Second, the plaintiff did not file this action until after the Supreme Court had denied certiorari on his habeas petition, even though, once the Eleventh Circuit denied rehearing and rehearing en banc in

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[6] The inadequacy of four months to resolve such a case is captured by the actual sequence of events in this litigation, which reflects no unusual delays (except perhaps with respect to service of process). The complaint was filed on May 14, 2007, and process was served two weeks later. (Doc. 10-11). The defendants received a one-week extension to file a responsive pleading, due to three other lethal injection cases (including *Grayson*) with pressing briefing deadlines. (Docs. 13-15). The motion to dismiss was filed on June 25, the plaintiff's opposition on July 16, and the defendants' reply on July 26. (Docs. 15, 17, 18). The Court's resolution of the motion comes two weeks after it became ripe. Were the motion denied, only seven weeks would remain before the plaintiff's scheduled execution date in which to conduct discovery, entertain dispositive motions and/or hold an evidentiary hearing, enter a ruling, and perfect and conclude an appeal.

August 2006, "it was all but guaranteed that [he] would die by lethal injection," and even though such a delayed filing "is simply too late to avoid the inevitable need for a stay of execution." *Jones*, 485 F.3d at 639 n.2. Such conduct "leaves little doubt that the real purpose behind his claim is to seek a delay of his execution, not merely to effect an alteration of the manner in which it is carried out." *Id.* at 640 (internal quotes omitted); *accord Grayson*, 2007 WL 2027903 at *7 ("If Grayson truly had intended to challenge Alabama's lethal injection protocol, he would not have deliberately waited to file suit until a decision on the merits would be impossible without entry of a stay or an expedited litigation schedule."). The equitable pendulum thus swings even further away from the plaintiff.

The plaintiff complains that laches "requires the Court to engage in a fact-specific inquiry that is inappropriate at this stage of the litigation" and must await a motion for summary judgment. (Doc. 17 at 8, 25). As a threshold matter, the equitable timeliness of the plaintiff's complaint is not measured by traditional laches principles but by the specialized "equitable principles at issue when inmates facing imminent execution delay in raising their § 1983 method-of-execution challenges." *Grayson*, 2007 WL 2027903 at *3.[7] Moreover, the

[7] Thus, the defendants need not show the "undue prejudice" that is an element of laches, "classic elements" of which "include unavailability of witnesses, changed personnel, and the loss of pertinent records." *Equal Employment Opportunity Commission v. Dresser Industries, Inc.*, 668 F.2d 1199, 1203 (11th Cir. 1982) — matters which prejudice a defendant in his ability to defend the litigation. Of course, the equitable principles in play here do not ignore prejudice but find it, as a

mere fact that the defendants characterized their defense as one of laches does not justify ignoring the specialized principles in favor of the traditional laches approach.[8]

Nor is there any impediment to resolving the timeliness issue on motion to dismiss. In *Rutherford I* and *II*, the Eleventh Circuit upheld the trial court's dismissal of the plaintiff's complaint the day after it was filed. *Rutherford v. Crosby*, 2006 WL 228883 (N.D. Fla. 2006). This is not surprising, since the relevant facts made the focus of *Jones*, *Grayson*, *Rutherford II* and *Hill* are based on the complaint, the procedural history, and publicly available sources. The plaintiff insists that resolution of the defendants' motion is premature because his "knowledge of the facts underlying this action is disputed." (Doc. 17 at 26). The inquiry, however, is

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matter of law, in the damage caused by an unreasonably delayed Section 1983 challenge to the interests of the state and victims "in the timely enforcement of a sentence." *Jones v. Allen*, 485 F.3d at 638 (internal quotes omitted); *accord Grayson*, 2007 WL 2027903 at *8. It is precisely the prejudice to these interests that compels a presumption against injunctive relief when the plaintiff unreasonably delays bringing suit. *Id.* at *3.

[8] This is clearly seen in *Grayson*, where the defendants articulated their defense as one of laches, *Jones v. Allen*, 2007 WL 1491009 at *3 (M.D. Ala. 2007), the district court analyzed it as such, *id.* at *5-11, and the Eleventh Circuit then merely noted this history and thereafter ignored laches altogether. 2007 WL 2027903 at *3; *see also Williams v. Allen*, 2007 WL 2206816 at *3-4 (M.D. Ala. 2007) (although the defendants called their defense one of laches, the district court instead followed the "well-established equitable principles" of *Grayson* and other cases).

what he (or his counsel) knew or "should have known," and what they should have known is established by sources independent of the plaintiff. Moreover, postponing resolution of the timeliness issue in this fashion would effectively eviscerate the *Hill* Court's admonition that "federal courts can and should protect States from dilatory or speculative suits." 126 S.Ct. at 2104. The plaintiff's suggested procedure would enable any prisoner to file a Section 1983 challenge shortly prior to his execution date with confidence that the court, unable to rule quickly on a timeliness objection, would be required to enter a stay of execution.[9] The perversity of this result would alone compel rejection of the plaintiff's proposal.

For the reasons set forth above, the defendants' motion to dismiss is **granted**. Judgment shall be entered accordingly by separate order.

DONE and ORDERED this 10th day of August, 2007.

s/ WILLIAM H. STEELE
UNITED STATES
DISTRICT JUDGE

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[9] Because the timeliness of a request for stay is measured the same as the timeliness of a request for injunctive relief, the court could not refuse a stay any more quickly than it could dismiss the case.

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 07-13929

D.C. Docket No. 07-00342-CV-WS-C

THOMAS D. ARTHUR,

Plaintiff-Appellant,

Versus

RICHARD ALLEN,
GRANTT CULLIVER,

Defendants-Appellees.

Appeal from the United States District Court for the Southern District of Alabama

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(September 17, 2007)

Before BIRCH, BLACK and BARKETT, Circuit Judges.

PER CURIAM:

Plaintiff Thomas D. Arthur is an Alabama death row inmate scheduled for execution by lethal injection on 27 September, 2007. On 17 April, 2007, the State of Alabama ("Alabama") filed its motion to set an execution date. On 14 May, 2007, Arthur filed a 42 U.S.C. § 1983 complaint in the United States District Court for the Southern District of Alabama, challenging Alabama's method of execution. On 22 June, 2007, the Alabama Supreme Court granted Alabama's motion, and set the execution date for 27 September, 2007. Alabama moved to dismiss the complaint on 25 June, 2007, alleging that Arthur's complaint was barred by the statute of limitations, laches, or for failure to state a claim upon which relief could be granted. The district court granted Alabama's motion on the basis of laches. *Arthur v. Allen*, No. 07-0342, 2007 WL 2320069 (S.D. Ala. Aug. 10, 2007) ("*Arthur*"). Arthur timely appealed. After an expedited briefing schedule, we affirm the district court's judgment dismissing Arthur's § 1983 action.

I. BACKGROUND

The details of Arthur's offense are set forth in our opinion affirming the district court's judgment denying Arthur federal habeas relief. *See Arthur v. Allen*, 452 F.3d 1234 (11th Cir.), *modified on reh'g*, 459 F.3d 1310 (11th Cir. 2006), *cert. denied*, __ U.S. __, 127 S. Ct. 2033 (2007). Briefly, in 1982, Arthur, while serving a sentence for murder in the second degree and assigned to a work release center, murdered Troy Wicker, the husband of one of Arthur's paramours, by shooting Wicker through the

right eye, while he was asleep, with a .22 caliber pistol.

Arthur was indicted for murder, convicted, and sentenced to death by electrocution in 1982. His conviction and sentence were affirmed by the Alabama Court of Appeals, *Arthur v. State*, 472 So. 2d 650 (Ala. Crim. App. 1984), but reversed by the Alabama Supreme Court because the trial court had improperly permitted evidence of Arthur's prior murder conviction. *In re Arthur*, 472 So. 2d 665, 668-70 (Ala. 1985). The case was remanded for a new trial. *Arthur v. State*, 472 So. 2d 670 (Ala. Crim. App. 1985). In 1987, Arthur was again convicted and sentenced to death. His conviction was reversed, however, because of the admission of Arthur's statement to the police after he had invoked his right to remain silent. *Arthur v. State*, 575 So. 2d 1165, 1171-75 (Ala. Crim. App. 1990), *cert. denied*, *In re Arthur*, 575 So. 2d 1191 (Ala. 1991) (per curiam). In 1991, Arthur was indicted and convicted of murder for pecuniary gain. Arthur was sentenced to death in 1992. His conviction and sentence were affirmed. *Arthur v. State*, 711 So. 2d 1031 (Ala. Crim. App. 1996), *affirmed*, *In re Arthur*, 711 So. 2d 1097 (Ala. 1997). He did not file a petition for writ of certiorari to the United States Supreme Court.

Approximately twenty-nine months later, in September 2000, Alabama filed a motion with the Alabama Supreme Court to set an execution date. In January 2001, Arthur filed a petition for postconviction relief with the state trial court. The petition, however, was dismissed as untimely because of a mandatory two-year limitations period required by Alabama Rule of Criminal Procedure 32.2(c), and that decision was affirmed. *Arthur v.*

State, 820 So. 2d 886, 888-90 (Ala. Crim. App. 2001) (per curiam), *cert. denied*, *Arthur v. Alabama*, 535 U.S. 1053, 122 S. Ct. 1909 (2002). Arthur's execution date was set for 27 April, 2001. *Ex parte Arthur*, 821 So. 2d 251 (Ala. 2001).

On 20 April, 2001, Arthur filed a federal petition for writ of habeas corpus. The district court granted a stay of execution and we denied a motion to vacate the stay. *Arthur v. Haley*, 248 F.3d 1302, 1303 (11th Cir. 2001) (per curiam). In July 2002, while Arthur's federal habeas petition was pending, the Alabama legislature changed Alabama's method of execution from electrocution to lethal injection. The new statute gave death-row inmates 30 days to elect electrocution instead. After that period of time, Alabama's sole method of execution would be lethal injection. *See* Ala. Code § 15-18-82.1 (2006 Cumulative Supp.).

The federal district court dismissed Arthur's habeas petition but granted a certificate of appealability. We affirmed the district court's denial of habeas relief in 2006, and the Supreme Court denied his petition for writ of certiorari on 16 April, 2007. The Alabama Supreme Court subsequently entered the order setting the date of execution.

II. DISCUSSION

Arthur's § 1983 action challenged Alabama's three-drug lethal injection protocol for violating the Eighth Amendment's prohibition against cruel and unusual punishment, and sought injunctive and declaratory judgment to prevent Alabama's use of the lethal injection procedure. The district court dismissed Arthur's § 1983 challenge, finding that

Arthur delayed unnecessarily in bringing his lethal injection challenge. On appeal, Arthur contends that the district court erred in applying the "specialized equitable principles" for laches and in dismissing his complaint based on these principles without a clear standard for measuring the timeliness of his lethal injection challenge. We disagree.

"[We] review the district court's dismissal of a § 1983 method-of-execution challenge [under the doctrine of laches] for abuse of discretion." *Grayson v. Allen*, 491 F.3d 1318, 1321 n.2 (11th Cir.), *cert. denied*, __ U.S.__, __ S. Ct.__, 2007 WL 2086662, 76 U.S.L.W 3049 (Jul. 26, 2007). "'[T]he equitable principles at issue when inmates facing imminent execution delay in raising their § 1983 method-of-execution challenges are equally applicable to requests for both stays and injunctive relief' and are 'not available as a matter of right.'" *Williams v. Allen*, ___ F.3d ___, 2007 WL 2368028 at *2 (11th Cir. 2007) (quoting *Grayson*, 491 F.3d at 1322). Those equitable principles include (1) "sensitiv[ity] to the State's strong interest in enforcing its criminal judgments without undue interference from the federal courts," (2) the plaintiff's satisfaction of "all of the requirements for a stay, including a showing of a significant possibility of success on the merits," (3) the application of "a strong equitable presumption against the grant of a stay where the claim could have been brought at such a time as to allow consideration of the merits without requiring entry of a stay," and (4) protection of the "States from dilatory or speculative suits." *Hill v. McDonough*, __ U.S. __, __, 126 S. Ct. 2096, 2104 (2006) (quoting *Nelson v. Campbell*, 541 U.S. 637, 649-50, 124 S. Ct. 2117, 2126). The strong interest of the State and the

victims's families is "the timely enforcement of a sentence", *id.* at __, 126 S. Ct. at 2104, which acquires "an added moral dimension" once post-trial proceedings finalize. *Calderon v. Thompson*, 523 U.S. 538, 556 118 S. Ct. 1489, 1501 (1998).

A. Application of Specialized Equitable Principles for Laches

Arthur contends that the district court erred by applying the specialized equitable principles instead of applying the elements of laches or the proper legal standards for a Federal Rule of Civil Procedure Rule 12 dismissal. He maintains that we have not replaced the doctrine of laches with specialized equitable principles and that such a dismissal requires a fact-specific inquiry inappropriate on a motion to dismiss. He argues that his action, which was filed four months before his scheduled execution, was filed sufficiently in advance to permit limited discovery on his purported delay and the alleged prejudice to the State and the victim's family.

Relying upon the analysis set forth in *Rutherford v. McDonough*, 466 F.3d 970 (11th Cir.), *cert. denied*, U.S. . 127 S. Ct. 465 (2006), and *Grayson*, the district court found that Arthur had unreasonably delayed in filing his § 1983 action. In considering the dismissal of a lethal injection challenge, courts are to apply equitable principles which mandate dismissal when the plaintiff "delayed unnecessarily in bringing the claim, . . . knowing full well that the discovery, evidentiary hearing, and decision on the merits that he demands could not possibly be accomplished" within the short period of time between filing and the scheduled execution date. *Rutherford*, 466 F.3d at 974 (also citing and quoting

Hill, __ U.S. at __, 126 S. Ct. at 2104 ("The federal courts can and should protect States from dilatory . . . suits" or "suits . . . filed too late in the day."); *see also Grayson*, 491 F.3d at 1321 ("[C]ourts considering dismissal of a dilatory § 1983 suit seeking injunctive relief should recognize the 'strong equitable presumption against the grant of a stay where a claim could have been brought at such a time as to allow consideration of the merits without requiring entry of a stay" (quoting *Rutherford*, 466 F.3d at 974 (quoting *Hill*, U.S. at __, 126 S. Ct. at 2104))); *Williams*, __ F.3d at __, 2007 WL 2368028 at *4 ("[T]he district court did not abuse its discretion in dismissing Williams's § 1983 action due to his unnecessary delay, especially given the strong presumption against the grant of equitable relief.").

As the district court concluded, Arthur is unable to defeat the State's motion to dismiss. Any claim of reasonable ignorance of the State's lethal injection protocol is belied by Arthur's complaint in which he alleged, based on "information and belief," that Alabama uses the three-drug cocktail, specifically identified as Thiopental, Pavulon, and potassium chloride, and his acknowledgment that a number of Alabama cases were filed in the summer and fall of 2006 alleging that Alabama used the same three-drug cocktail. R-1 at 6-7; *Arthur*, slip op. at __, 2007 WL 2320069 at *2; *see e.g.*, *Jones v. Allen*, 485 F.3d 635, 641 n.3 (11th Cir.), *cert. denied*, __ U.S. __, 127 S. Ct. 2160 (2007); *Grayson*, 491 F.3d at 1323; *Williams*, __ F.3d at__, 2007 WL 2368028 at *3. Further, nothing precluded Arthur from filing a § 1983 challenge to our circuit precedent mandating that method-of-execution claims be raised only in a habeas petition. *See Williams*, __ F.3d at __, 2007

WL 2368028 at *2 (citing *Grayson*, 491 F.3d at 1322). Arthur did not file his § 1983 action until almost 16 months after the Supreme Court granted *certiorari* in *Hill v. Crosby*, 546 U.S. 1158, 126 S. Ct. 1189 (2006), and almost 11 months after the Supreme Court clarified in *Hill* that inmates could file § 1983 challenges to a state's execution procedures. Although "the equitable considerations in each case are naturally different," even if Arthur would have been entitled to a decision on the merits if he had brought his suit in time to allow consideration of the merits without the entry of a stay, the strong presumption against a stay operates against him. *See Jones*, 485 F.3d at 641 n.4.

B. Standards for Timeliness of a Lethal Injection Challenge

Arthur argues that, if specialized equitable principles apply, the equities weigh in favor of Arthur litigating the merits of his case and against dismissal. He asserts that the standards for the timeliness of his challenge are novel and undefined. He maintains that his complaint was prompt by reasonable standards because it was filed in less than a month after the Supreme Court denied certiorari on his federal habeas corpus petition and before the Alabama Supreme Court had set an execution date.

The district court noted that we have "declined to determine precisely when [a § 1983 method-of-execution challenge] becomes ripe, but [we] ha[ve] clearly rejected the notion that denial of certiorari is required," and concluded that Arthur unreasonably delayed filing his action when he did not file for nine months after we had denied relief in his federal

habeas action in August 2006. *Arthur*, slip op. at __, 2007 WL 2320069 at 4.

In rejecting similar challenges, we have held that waiting until the Supreme Court has denied certiorari review of a federal habeas petition or even until a certiorari petition has been pending for over three months, *Jones*, 485 F.3d at 640 n.2, or "until after the State file[s a] motion to set the execution date is too late to avoid the inevitable need for a stay of execution" and is too late to allow for a full adjudication of the merits of his action. *See Williams*, __ F.3d at __, 2007 WL 2368028 at *2.

Arthur's § 1983 action was filed before his execution date was set but was filed only four months before the execution date was ultimately set. In Alabama, "it is common practice for the State to ask the Alabama Supreme Court to set an execution date for a death row inmate shortly after the United States Supreme Court has denied certiorari review of the [inmate's] federal habeas petition. *Williams*, __ F.3d at __, 2007 WL 2368028 at *2 (citing *Jones*, 485 F.3d at 639 n.2). When Arthur filed his petition for writ of certiorari in the Supreme Court on 11 January, 2007, it was clear that a denial of the petition would remove the final obstacle to lifting the stay of execution. Once the stay was lifted, execution could be set in as few as 30 days. *See* Ala. R. App. P. 8(d)(1); *see also Jones*, 485 F.3d at 639 n.2. As the district court noted, four months is not enough time for this case to be fully adjudicated. *See Arthur*, slip op. at __, 2007 WL 2320069 at *4 and n.6. Arthur was on notice that a challenge to Alabama's method-of-execution was available under § 1983 as early as June 2006, as a result of the Supreme Court's

decision in *Hill*, or August 2006, as a result of other filed Alabama actions.[10]

III. CONCLUSION

We conclude that the district court did not abuse its discretion in dismissing Arthur's § 1983 action due to laches, especially given the strong presumption against the grant of equitable relief. There was no justification for Arthur's failure to bring his lethal injection challenge earlier to allow sufficient time for full adjudication on the merits of this claim. Accordingly, the district court's judgment of dismissal is **AFFIRMED**.

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[10] Following the *Hill* decision and clarification that a method-of-execution challenge was to be filed as a § 1983 action and not as a petition for writ of habeas corpus, there was no impediment to Arthur seeking relief under § 1983 during the pendency of his habeas corpus petition. *See Nelson v. Campbell*, 541 U.S. 637, 643, 124 S. Ct 2117, 2122 (2004); *Grayson*, 491 F.3d at 1323; *Williams*, __ F.3d at __, 2007 WL 23688028 at *2.

BARKETT, Circuit Judge, dissenting:

I dissent believing it to be error for the district court to refuse to hear an Eighth Amendment challenge to Alabama's lethal injection protocol simply because the § 1983 petitioner failed to file his claim as soon as the Alabama legislature changed Alabama's method of execution to lethal injection. *See also Williams v. Allen*, No. 07-13638 at *5, ---F.3d---, 2007 WL 2368028 (11th Cir. Aug. 21, 2007) (Barkett, J., dissenting).

First, it is wholly unreasonable to expect an inmate to have predicted scientific data—only recently available—that suggests that inadequacies in the three-drug protocol inflict "cruel and unusual punishment" as proscribed by the Eighth Amendment. *See id.* Assuming *arguendo* that the three-drug protocol *does* violate the Eighth Amendment, and that the scientific evidence that showed this did not come into existence until some time after Alabama adopted the protocol, the practical effect of our law in this area is to knowingly permit the *unconstitutional* execution of several inmates, simply because the inmates had the misfortune of being sentenced to death *before* the scientific data revealing the constitutional infirmity of such executions could have been known. This is patently unacceptable. Indeed, the Constitution forbids the *infliction* of "cruel and unusual punishment" at the time of its imposition, regardless of the circumstances at the time the death penalty *sentence* was imposed.

Second, I continue to find untenable the suggestion that the petitioner "should have *anticipated* the denial of all relief and filed this case prior to the determination of his pending case." *See*

id. (emphasis in original). Indeed, even the State of Alabama itself is not so bold and therefore will not set an execution date until *after* the United States Supreme Court denies certiorari review of an inmate's federal habeas petition. *See Jones v. Allen*, 485 F.3d 635, 639 n.2 (11th Cir. 2007).

For these reasons, I dissent.

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION

Plaintiff/Counter-Defendant,	)	
v.	)	Case No. 2:06-cv-695-WKW
J, et al.	)	
Defendants/Counter-Plaintiffs.	)	

AN,	)	
Plaintiff/Counter-Defendant.	)	
v.	)	Case No. 2:06-cv-919-WKW
J, et al.	)	
Defendants/Counter-Plaintiffs.	)	

ORDER ON PRETRIAL HEARING

It is ORDERED that:

1. The trial of this matter, which is to last three days, is CONTINUED from October 2, 2007, to October 3, 2007, at 9:00 a.m., in courtroom 2-E,

Frank M. Johnson, Jr. U.S. Courthouse Complex, One Church Street, Montgomery, Alabama.

2. This case is set for a final pretrial hearing as provided by Rule 16 of the Federal Rules of Civil Procedure, on **October 2, 2007, at 10:00 a.m.**, in courtroom 2-E, Frank M. Johnson, Jr. U. S. Courthouse Complex, One Church Street, Montgomery, Alabama.

ALL TRIAL ATTORNEYS must appear at the time above designated and be fully prepared and authorized to admit all facts that are true. Any pending motions shall be heard at this time; thus, counsel should be prepared to present oral argument.

3. The parties shall immediately issue trial subpoenas, if any. Any motions to quash shall be filed **on or before September 14, 2007.**

4. Court is open. Should either party wish to close the courtroom or otherwise deny, in whole or in part, public access to evidence taken at trial, that party shall file a motion, fully briefed with case citations thereon, **on or before September 14, 2007.** The non-moving party shall file a responsive brief **on or before September 21, 2007.** Reply briefs will not be accepted.

5. The parties shall exchange Rule 26(a)(3) information **on or before September 14, 2007.** The parties shall then exchange Rule 26(a)(3) objections to depositions designations and to admissibility of evidence on or before **September 19, 2007.** The parties shall then confer to resolve any objections. **On or before September 24, 2007,** the plaintiffs shall file the JOINTLY prepared witness list, list of deposition designations, and exhibit list, with objections disclosed thereon. If objections are not so disclosed, other than objections under Rule 402 and

403 of the Federal Rules of Evidence, objections are waived unless excused by the court for good cause.

6. Motions in limine, if any, shall be filed **on or before September 24, 2007.** Responses to any motions shall be filed **on or before September 28, 2007.** Reply briefs will not be accepted.

7. The parties shall JOINTLY prepare a list of stipulations of facts. The plaintiffs shall file this document **on or before September 26, 2007.**

8. The parties shall each prepare a summary of their contentions and shall each file the summary **on or before September 26, 2007.**

9. The parties are not required to file trial briefs before the trial, but if they choose to do so, the briefs shall be filed **on or before September 28, 2007.**

In lieu of closing arguments, the parties shall file briefs after trial. The plaintiffs shall file their closing brief, with proposed findings of fact and conclusions of law, **on or before October 9, 2007.** The defendants shall file their responsive brief, with proposed findings of fact and conclusions of law, **on or before October 12, 2007.** The plaintiffs may file a reply brief **on or before October 15, 2007.**

10. At the October 2, 2007 final pretrial hearing, the parties shall each submit three binders of copies of the pre-marked exhibits for use by the court (judge, law clerk, and courtroom deputy).

11. The parties shall review and comply with the Middle District of Alabama's Order on the E-Government Act.

12. The parties shall notify Chambers of the undersigned **on or before September 14, 2007,** regarding any mediation efforts undertaken.

13. The parties have indicated that there are no other disputes at this time. All understandings,

agreements, and deadlines contained in this Order and discussed at the September 5, 2007 pretrial conference shall be binding on all parties unless modified by the Court.

DONE this 7th day of September, 2007.

/s/ W. Keith Watkins
UNITED STATES DISTRICT JUDGE

STATE OF ALABAMA §
§
MONTGOMERY COUNTY §

PROFESSIONAL SERVICES CONTRACT

BETWEEN THE ALABAMA OFFICE OF THE ATTORNEY GENERAL

AND

MARK DERSHWITZ, M.D., Ph.D.

CONTRACT NUMBER: C8053003

Because of an identifiable need to acquire professional services for an expert witness on behalf of the Office of the Attorney General (hereinafter referred to as the Department) to testify or prepare affidavits in cases that challenge the lethal injection method of execution or its effect on State defendants, Mark Dershwitz, M.D., Ph.D. (hereinafter referred to as the Contractor) and the Department have entered into a contract for the provision of such services effective upon approval by the Governor.

WHEREAS, The Department has statutory authority to enter into contracts with any private person, organization, or group; and

WHEREAS, the Department has a need for the professional services;

NOW, therefore, the Department and the Contractor, intending to be mutually bound and in consideration of the mutual covenants and stipulations set out herein, agree as follows:

I. **Services to be provided:**

The Contractor possesses a high degree of professional skill in pharmacology and anesthesiology. The Contractor, in addition to being a licensed medical doctor, also holds a Ph.D. in pharmacology and is licensed by the American Board of Anesthesiology.

The Contractor will review the chemical composition of drugs used in lethal injections administered to State capital murder defendants during the execution process. After such review, the Contractor will provide expert consultation to the Department and provide affidavits and/or expert testimony, if needed. The Contractor will perform such services when cases challenge the use of lethal injection and/or the effect of lethal injections on State defendants. Affidavits and/or expert testimony may be necessary to adequately represent the State, because the defendants retain experts whose opinions and/or testimony will need to be rebutted.

II. **Period of Contract:**

The terms of this contract shall begin on October 1, 2007 or the date of final approval by the Governor, whichever occurs later. At that time, the Contractor will commence performance of the contract and shall complete performance on or before September 30, 2009.

The Contractor acknowledges and understands that this contract is not effective until it has received all requisite state government approvals and the Contractor shall not begin performing work under this contract until notified to do so by the Department. The Contractor is entitled to no compensation for work performed prior to the effective date of this contract.

III. **Termination of Contract:**

A. The contract may be terminated at any earlier date upon mutual agreement of the parties, or upon ten days written notice by one of the contracting parties to the other contracting party.

1. The Contractor will cease work upon receipt of the Department's termination notice, and all costs incurred prior to the issuance and receipt of cancellation shall be paid by the Department.

2. It is expressly understood and agreed by the parties hereto that the Department shall, in all events, anything herein to the contrary notwithstanding, have the option to terminate this Contract at the end of any fiscal year of the State of Alabama so as not to be obligated under the terms herein for the following fiscal year.

IV. **Financial Arrangements:**

A. The parties hereto agree that this Contract is a Fee for Services Contract and that the sum total of the professional services to be provided during the operation of this Contract

shall not exceed twenty thousand dollars ($20,000) to include expenses of no more than three thousand dollars ($3,000).

1. The Department shall pay the Contractor for services rendered on a case by case basis as invoiced after the services are performed at the rate of four hundred dollars ($400) per hour for review, research, writing, and/or travel time.

2. The Department shall pay the Contractor a flat fee of three thousand dollars ($3,000) for each day that the Contractor actually provides expert testimony on behalf of the State. Payment for these services will be made as invoiced after the services are performed.

2. Travel authorized by the Department shall be reimbursed at the standard rates paid to State employees, but in no event shall travel expenses under this Agreement exceed three thousand dollars ($3,000).

3. In the event of cancellation of the contract by either party, payment shall be made as specified in Paragraph III.A.1 above.

B. The Contractor shall submit an itemized written statement or invoice for services provided during the course of the contract on a case by case basis. Such statement or invoice shall be submitted to the Department in triplicate

V. Merit System Benefits Excluded:

It is further understood that the Contractor is an independent contractor; and, as such is not entitled to the benefits of the State Merit System Act for any work which is done for the Department under any terms of this Agreement.

VI. Findings Confidential:

Any reports, information, data, etc., given to or prepared or assembled by the Contractor under this Agreement which the Department requests to be kept as confidential shall not be made available to any individual or organization by the Contractor without the prior written approval of the Department, unless such confidentiality would be contrary to the laws of the State of Alabama or the United States.

VII. Coordination Contact:

The Department agrees to designate a single source contact for the purpose of coordination and problem solving during the terms of this contract. The designation shall be made in writing immediately after the signatures to the agreement have been obtained.

VIII. Equal Employment Opportunity:

There shall be no discrimination against any employee who is employed in the work covered by this Agreement, or against any applicant for such employment, because of race, color, religion, sex, national origin, age or disability. This provision shall include, but not be limited

to, the following: employment, upgrading, demotion or transfer; recruitment or recruitment advertising; layoff or termination; rates of pay or other forms of compensation; and selection for training including apprenticeship.

IX. Alternative Dispute Resolution

For any and all disputes arising under the terms of this agreement, the parties hereto agree, in compliance with the recommendations of the Governor and Attorney General, when considering settlement of such disputes, to utilize appropriate forms of non-binding alternative dispute resolution including, but not limited to, mediation through the Attorney General's Office of Administrative Hearings or where appropriate, private mediators.

X. Availability of Funds:

This Agreement is conditional upon the receipt of sufficient funds from the Alabama Legislature.

XI. Not to Constitute a Debt of the State:

Under no circumstances shall the commitments by the Department contained herein constitute a debt of the State of Alabama as prohibited by Section 213 of the Constitution of Alabama 1901, as amended by Amendment 26. It is further agreed that if any provision of this contract shall contravene any statute or constitutional provision or amendment, either now in effect or which may, during the course of this contract, be enacted, then that conflicting provision in the contract shall be deemed null and void. The Contractor's sole remedy for the

settlement of any and all disputes arising under the terms of this agreement shall be limited to the filing of a claim with the Board of Adjustment for the State of Alabama.

XII. **Proration Cancellation Clause**

In the event of the proration of the fund from which payment under this contract is to be made, the contract will be subject to termination.

IN WITNESS WHEREOF, the parties hereto have duly executed this Agreement on this 23rd day of July, 2007.

ALABAMA OFFICE OF THE ATTORNEY GENERAL

/s/ Troy King
Troy King
Attorney General

CONTRACTOR:

/s/ Mark Dershwitz
Dr. Mark Dershwitz

FEIN or SS# 381-62-4876

APPROVED:

_____
Bob Riley

Governor of Alabama

Panel Approves $400-an-hour Contract For Expert Witness

WVTM-TV

MONTGOMERY, Ala. (AP) · A legislative panel today approved a contract for the state to pay $400 an hour to a Massachusetts physician to analyze the combination of drugs used in Alabama executions.

The head of the attorney general's death penalty division, Clay Crenshaw, has said Dr. Mark Dershwitz could be called as a witness for the state in the trial of a lawsuit filed by death row inmates Willie McNair and James Callahan.

That case is scheduled to be tried October 2nd in federal court in Montgomery.

McNair and Callahan claim lethal injection can be painful and violates the U.S. Constitution's mandate against cruel and unusual punishment.

Dershwitz is a University of Massachusetts professor of anesthesiology who has been an expert witness on behalf of several states, defending their lethal injection methods against constitutional challenges.

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SUPREME COURT, U.S.

No. 07-395
(Application No. 07A252)
CAPITAL CASE

In the
SUPREME COURT OF THE UNITED STATES

THOMAS D. ARTHUR,

Petitioner,

v.

RICHARD F. ALLEN, ET AL.,

Respondents.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Eleventh Circuit

BRIEF OF RESPONDENTS IN OPPOSITION TO CERTIORARI AND ACCOMPANYING APPLICATION FOR STAY OF EXECUTION

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QUESTIONS PRESENTED
(Restated)

1. On this particular record, is there any basis for second-guessing the district court's factual findings, expressly adopted by the Eleventh Circuit, (1) that Arthur delayed unreasonably and unjustifiably in filing his § 1983 method-of-execution challenge and (2) that, by virtue of that delay, Arthur's lawsuit was not "brought at such a time as to allow for consideration of the merits without requiring entry of a stay" within the meaning of Nelson v. Campbell, 541 U.S. 637, 650 (2004), and Hill v. McDonough, 126 S. Ct. 2096 (2006)?

2. On this particular record, is there any basis for concluding that the lower courts abused their discretion, see Bowersox v. Williams, 517 U.S. 345, 346 (1996), by declining to stay the execution of a capital murderer who filed his lethal injection lawsuit with unreasonable delay, a conclusion supported by the fact that Arthur filed his lawsuit: (a) approximately five years after Alabama adopted lethal injection, (b) almost 10 months after other Alabama death row inmates began filing lethal-injection challenges, (c) after this Court denied certiorari from federal habeas review, (d) after the State of Alabama moved for an execution date, and (e) when Arthur was in the shadow of an execution date?

3. Whether this Court should grant certiorari to address an alleged circuit split when no such split exists, as evidenced by the relevant court of appeals consistently applying the "timeliness" requirement articulated in Nelson and Hill?

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INTRODUCTION

This Court has faced virtually the same set of circumstances presented in this case in recent cases in the last five months involving Alabama death-row inmates: Aaron Jones, Darrell Grayson, and Luther Williams. Indeed, Grayson and Williams filed virtually identical petitions for certiorari, and Arthur's is almost identical to those. All of these inmates filed a § 1983 action challenging Alabama's method-of-execution upon the conclusion of habeas corpus proceedings – typically, this Court's denial of certiorari. The plaintiff inmates, including Arthur, do not offer legitimate reasons for waiting to file their lethal-injection challenge. It is obvious that their late-filed claims have more to do with delaying an execution than it does seeking an alteration in Alabama's execution protocol. This Court denied equitable relief in those cases and should do the same here.

Arthur's § 1983 complaint primarily asserts that there is a risk that the inmate is not sufficiently anesthetized and as a result suffers excruciating pain when the potassium chloride is administered.[1] Complaint at ¶¶24-25. The complaint does not specifically state how this event could occur. To be frank, this allegation is nonsense, and courts have said so. In rejecting this assertion, a federal district judge in Virginia stated as follows:

> Plaintiff argues that the sodium thiopental may not be properly administered to him before the potassium chloride is administered and takes effect. If this happened, Plaintiff would feel a great deal

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[1] As a sub-part of this theory, Arthur's complaint states that pancuronium bromide (pavulon) acts to paralyze the inmate, thus not allowing the insufficiently-anesthetized inmate to exhibit pain. Complaint at ¶23.

> of pain. For this to occur, the sodium thiopental would fail to enter the bloodstream, but the potassium would enter his bloodstream. This outcome cannot reasonably be expected because all three drugs are administered through the same IV lines. Plaintiff's argument relies upon an accident or mistake, not a reasonably foreseeable problem with the protocol.

Walker v. Johnson, 448 F.Supp.2d 719, 723 (E.D. Va. 2006). For Arthur's scenario as described in his complaint to occur, sodium thiopental would not be delivered into the bloodstream, but then (as if by magic) the doses of pancuronium bromide and potassium chloride would be delivered, through the very same line, through the inmate's bloodstream.

STATEMENT OF THE CASE[2]

Arthur is traveling what is now becoming a well-traveled route: filing a lethal-injection challenge pursuant to 42 U.S.C. § 1983 at the conclusion of federal habeas proceedings. The district court dismissed Arthur's complaint because: (1) Arthur unreasonably delayed in filing his § 1983 action, and (2) solely due to that delay the merits could not be litigated without the entry of a stay of execution. (The district court's order can be found at pages A1-A13 in Arthur's appendix to the petition.) The Eleventh Circuit affirmed; ruling that the district court did not abuse its discretion in dismissing Arthur's § 1983 action due to laches, especially given the strong presumption against the grant of equitable relief. (The

[2] This brief responds both to Arthur's petition for certiorari and to the motion for a stay of execution.

Eleventh Circuit's opinion can be found at pages A14-A23 in Arthur's appendix to the petition.)

A. Chronology of Relevant Events

Arthur was originally convicted in 1982 for the capital offense of murdering Troy Wicker after having been convicted of a previous murder within 20 years preceding the instant murder. See Ala. Code § 13A-5-40(a)(13)(2006 Replacement Volume). Arthur has been on Alabama's Death Row for approximately 16 years after being convicted for capital murder and sentenced to death in 1992 (for the third time). Arthur v. State, 711 So. 2d 1031 (Ala. Crim. App. 1996); Ex parte Arthur, 711 So. 2d 1097 (Ala. 1997). Arthur exhausted his state and federal appeals when this Court denied certiorari review on April 16, 2007. Arthur v. Allen, __ U.S. __, 127 S.Ct. 2033 (Apr. 16, 2007). It was at that point, out of appeals and facing execution, that Arthur filed a § 1983 action challenging Alabama's execution procedures. See Doc. 1 (filed on May 14, 2007).[3] Arthur's complaint does not contain any statement regarding why he waited to file his § 1983 lawsuit until his federal habeas challenge ended and the State had sought an execution date.

B. Arthur's § 1983 Action

On May 14, 2007, Arthur filed a § 1983 action alleging that Alabama's execution procedures are unconstitutional under the Eighth and Fourteenth Amendments. See Doc. 1. In his complaint, Arthur seeks an injunction barring

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[3] On April 12, 2007, Arthur filed a § 1983 action requesting, among other things, that DNA testing be performed on several items. This complaint was dismissed by District Judge Keith Watkins on August 17, 2007, and affirmed by the Eleventh Circuit. See Arthur v. King, 2007 WL 2381992 (M.D. Ala. Aug. 17, 2007), aff'd, __ F.3d __, 2007 WL 2744884 (11th Cir. Sept. 21, 2007).

the Alabama Department of Corrections from executing him with inadequate anesthesia and execution procedures that violate the Eighth Amendment's prohibition against cruel and unusual punishment. Id. He also seeks a declaratory judgment that Alabama's execution procedures violate that prohibition. Id. Arthur filed his complaint almost five years after the method of execution of his sentence changed by operation of law to lethal injection. See Ala. Code § 15-18-82.1 (2006 Cumulative Supplement) (Alabama law establishing lethal injection as the primary method of execution became effective on July 1, 2002). Arthur's complaint was filed after the conclusion of his federal habeas proceeding, see Arthur v. Allen, 127 S.Ct. 2033 (Apr. 16, 2007), and after the State, on April 17, 2007, moved for the Alabama Supreme Court to set an execution date, see Doc. 1 (complaint)(filed on May 14, 2007).

Because Arthur unjustifiably delayed in filing this lawsuit, the defendants (hereinafter "the State") moved to dismiss it on laches and statute-of-limitations grounds.[4] Doc. 15. In granting the State's motion, the district court decided two questions against Arthur. "The initial question ... is whether the plaintiff 'unreasonably delayed' in filing this action." Arthur v. Allen, 2007 WL 2320069 at *2 (S.D. Ala. Aug. 10, 2007). The district court ruled that Arthur "unreasonably delayed in filing this action" and that the delay was inexcusable. Id. at *2-4. "The second question that must be answered in determining if a strong presumption against a stay should be applied is whether the plaintiff's claim could have been brought at such a time as to allow consideration of the

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[4] The district court did not address whether Arthur's complaint was time-barred by the statute of limitations. Arthur, 2007 WL 2320069 at *1 (A3).

merits without requiring entry of a stay." Id. at *4 (punctuation omitted). Because Arthur offered no valid reason why his claim could not have been brought sooner, the district court correctly ruled that "[t]he equitable pendulum thus swings even further away from the plaintiff." Id. at *4. In answering these questions, the district court applied binding precedent from the Eleventh Circuit. See Grayson v. Allen, 2007 WL 2027903 (11th Cir.), cert. denied, 2007 WL 2086662 (2007); Jones v. Allen, 485 F.3d 635 (11th Cir), cert. denied, 127 S.Ct. 2160 (2007), Rutherford v. McDonough, 466 F.3d 970 (11th Cir.), cert. denied, 127 S.Ct. 465 (2006); Hill v. McDonough, 464 F.3d 1256 (11th Cir. 2006), cert. denied, 127 S.Ct. 465 (2006); Williams v. Allen, __ F.3d __, 2007 WL 2368028 (11th Cir. Aug. 21, 2007), stay denied, 2007 WL 2398491 (Aug. 23, 2007).

The Eleventh Circuit affirmed the district court's dismissal of Arthur's lethal-injection challenge. The Eleventh Circuit ruled that "[i]n considering the dismissal of a lethal injection challenge, courts are to apply equitable principles which mandate dismissal when the plaintiff 'delayed unnecessarily in bringing the claim, ... knowing full well that the discovery, evidentiary hearing, and decision on the merits that he demands could not possibly be accomplished' within the short period of time between filing and the scheduled execution date." Arthur at A19 (quoting Rutherford v. McDonough, 466 F.3d 970 (11th Cir. 2006)(quoting Hill, __ U.S. at __, 126 S. Ct. at 2104)). The Eleventh Circuit then held that the balance of the equities tilts against Arthur because, among other reasons, "Arthur was on notice that a challenge to Alabama's method-of-execution was available under § 1983 as early as June 2006, as a result of the Supreme Court's decision in Hill, or August 2006, as a result of other filed Alabama actions." Arthur at A22-A23.

The procedural history of this case demonstrates that Arthur has not sought to expedite this case. After filing the § 1983 action, Arthur made no filings other than a court-ordered response to the State's motion to dismiss. Arthur did not seek any discovery nor did he request that the case be expedited. Arthur did not submit any evidentiary submissions in an effort to demonstrate a likelihood of success on the merits. Thus, any contention by Arthur that the district court has not addressed the merits of his complaint is undermined by the fact that no evidentiary submission was presented.

The State recognizes that issues surrounding the death penalty carry much emotion. The State also agrees that executions should be performed in a constitutional manner (which it does). Even though Arthur did not present any evidence to the district court, another district court has addressed the merits of a lethal-injection challenge against Alabama's protocol on the basis of an evidentiary submission that the court stated was "substantial." Grayson v. Allen, __ F.Supp.2d __, 2007 WL 1491009 at *12 (May 21, 2007 M.D. Ala.), aff'd, Grayson v. Allen, 491 F.3d 1318 (July 16, 2007), cert. denied, Grayson v. Allen, __ S.Ct. __, 2007 WL 2086662 (July 26, 2007). In evaluating Grayson's evidentiary submission that included an affidavit from an expert witness, the district court ruled that "Grayson cannot show a likelihood of success on the merits, much less a significant likelihood." Grayson, 2007 WL 1491009 at *12. In particular, the district court stated the following:

> What the evidence does not establish is relevant to this analysis: (1) any execution 'mishap' in an Alabama lethal injection execution; (2) any cruel or unusual pain suffered by an inmate in an Alabama lethal injection execution; (3) any mishap in the

> delivery or injection of the three-drug mix in Alabama; or (4) any other compelling reason that suggests a substantial risk of cruel and unusual pain in future lethal injection executions in Alabama. Grayson's arguments, and the evidence upon which they are based, do not establish a significant likelihood of success on the merits.

Grayson, 2007 WL 1491009 at *12 (emphasis in original). Finally, the district court in Grayson found that "[t]he absence of evidence of a mishap, or even the risk of something more than negligence, not only controverts Grayson's claim, but it also significantly diminishes the probative value of training and procedural deficiencies that he alleges exist in Alabama's system." Id.

REASONS FOR DENYING THE WRIT AND THE ACCOMPANYING STAY REQUEST

I. THERE IS NO BASIS FOR SECOND-GUESSING THE LOWER COURTS' FACT-BOUND DETERMINATION THAT, ON THIS RECORD, ARTHUR UNREASONABLY DELAYED IN FILING HIS § 1983 ACTION AND THAT HIS DELAY WOULD MAKE IT IMPOSSIBLE TO ADJUDICATE HIS CHALLENGE FULLY AND FAIRLY WITHOUT A STAY

The Eleventh Circuit, in this case and in other recent decisions, has correctly applied the holdings of this Court in determining whether an inmate is entitled to a stay of execution when he files his lethal-injection with unjustifiable delay. This Court has stated that "[a] court considering a stay must also apply 'a strong equitable presumption against the grant of a stay where a claim could have been brought at such a time as to allow

consideration of the merits without requiring entry of a stay.'" Hill v. McDonough, __ U.S. __, 126 S.Ct. 2096, 2104 (2006) (quoting Nelson v. Campbell, 541 U.S. 637, 650, 124 S.Ct. 2117, 2126 (2004)). The Eleventh Circuit, in this case and in other recent decisions, has made this paramount inquiry in deciding whether to grant equitable relief. Thus, the standard of "timeliness" that Arthur seeks to be defined has already been articulated by this Court in Nelson and Hill.[5] Arthur's petition also requests this Court to reassess the highly fact-specific considerations that led the courts below to deny equitable relief in the particular circumstances presented by this case. Such a request for what can only be understood as pure fact-bound, error-correction is, as a rule, an insufficient basis for certiorari. See Sup. Ct. R. 10; R. Stern, E. Gressman, et al., Supreme Court Practice § 4.14, at 249 (8th ed. 2002). That is particularly true where, as here, a petitioner asks this Court to second-guess lower courts' determinations of their own ability to fairly and properly adjudicate a case in a particular timeframe, as well as those courts' management of their own dockets.

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[5] Arthur criticizes the Eleventh Circuit for not "clarifying the proper standard for determining the timeliness of a lethal injection challenge, holding only that actions are untimely when filed 'too late to allow for a full adjudication of the merits of [a plaintiff's] action.'" Pet. at 10. However, the Eleventh Circuit was applying the standard for timeliness that this Court articulated in Nelson, 541 U.S. at 650, and Hill, 126 S. Ct. at 2104. That timeliness standard is clear on its face and needs no further explication.

A. The Eleventh Circuit, In This Case And Others, Faithfully Applies Nelson and Hill In Deciding Whether An Inmate Is Entitled To A Stay of Execution

The Eleventh Circuit concluded that Arthur's unreasonable and unexcused delay in waiting until late in the litigation day to file his § 1983 lethal-injection challenge disentitled him from equitable relief, see Arthur, A17-A23, which is all the relief Arthur was seeking. The Court further determined that "the equitable principles at issue when inmates facing imminent execution delay in raising their § 1983 method-of-execution challenges are equally applicable to requests for both stays and injunctive relief." Arthur at A18 (quoting Williams v. Allen, __ F.3d __, 2007 WL 2368028 at *2 (11th Cir. 2007)(quoting Grayson, 491 F.3d at 1322, cert. denied, 2007 WL 2086662 (July 26, 2007).

The law applied by the Eleventh Circuit is discussed in Nelson. There, this Court explained why its decision in that case would not "open the floodgates to all manner of method-of-execution challenges, as well as last minute stay requests." See Nelson, 541 U.S. at 649. In that explanation, this Court discussed its earlier decision in Gomez v. United States Dist. Court for N. Dist. of Cal., 503 U.S. 653 (1992), which had vacated a stay of execution entered by the federal appeals court in a § 1983 lawsuit challenging the method of execution, even though the Court recognized that the claim may have been cognizable under § 1983. The reason this Court had concluded that the inmate was not entitled to a stay of execution in Gomez is that he had "waited until the 11th hour to file his challenge despite the fact that California's method of execution had been in place for years." Nelson, 541 U.S. at 649.

This Court reiterated in Hill what it said in Nelson, 541 U.S. at 649-50, about a stay of execution being an equitable remedy, not available as a matter of right, and that federal courts considering a stay request must be "sensitive to the State's strong interest in enforcing its criminal judgments without undue interference from the federal courts." Hill, 126 S.Ct. at 2104. The equitable principles articulated by this Court and applied by the Eleventh Circuit are:

> (1) 'sensitivity to the State's strong interest in enforcing its criminal judgments without undue interference from the federal courts,' (2) the plaintiff's satisfaction of 'all of the requirements for a stay, including a showing of a significant possibility of success on the merits,' (3) the application of 'a strong equitable presumption against the grant of a stay where the claim could have been brought at such a time as to allow consideration of the merits without requiring entry of a stay,' and (4) protection of the 'States from dilatory or speculative suits.'

Arthur, at A18 (quoting Hill v. McDonough, __ U.S. __, __, 126 s.Ct. 2096, 2104 (2006)(quoting Nelson v. Cambell, 541 U.S. 637, 649-50, 124 S. Ct. 2117, 2126). In Hill, this Court cited to opinions from a number of federal courts that had exercised their equitable powers to dismiss this type of lawsuit on grounds that the claim about the lethal injection procedures and protocol was too speculative or had been filed too late. Id. at 2104 (citing Hicks v. Taft, 431 F.3d 916 (6th Cir. 2005); White v. Johnson, 429 F.3d 572 (5th Cir. 2005); Boyd v. Beck, 404 F.Supp.2d 879 (E.D. N.C. 2005)). Although not passing judgment on those decisions, this Court did say that "federal courts can

and should protect States from dilatory and speculative suits." Id.

In denying equitable relief to Arthur, the Eleventh Circuit correctly applied this Court's precedent. The Court properly ruled that "courts are to apply equitable principles which mandate dismissal when the plaintiff 'delayed unnecessarily in bringing the claim, ... knowing full well that the discovery, evidentiary hearing, and decision on the merits that he demands could not possibly be accomplished' within the short period of time between filing and the scheduled execution date. Arthur at A19 (quoting Rutherford, 466 F.3d at 974) (also citing and quoting Hill, __ U.S. at __, 126 S. Ct. at 2104). Thus, the Eleventh Circuit concluded that the district court did not abuse its discretion in dismissing Arthur's § 1983 action due to his unnecessary delay, especially given the strong presumption against the grant of equitable relief. Arthur, at A19-A23.

B. The Eleventh Circuit's Fact-Bound Determination That Arthur Unjustifiably Delayed In Filing His Lethal-Injection Lawsuit Does Not Warrant Certiorari Review

Contrary to Arthur's assertion, the Eleventh Circuit addressed the "particularized facts" in rejecting Arthur's lethal-injection challenge. Arthur at A19-A23. Despite acknowledging that a "number of Alabama cases were filed in the summer and fall of 2006" alleging that Alabama's execution procedures were unconstitutional, Arthur waited until May 14, 2007, to file his lethal-injection claim. Arthur at A20. Further, "Arthur did not file his § 1983 action until almost 16 months after the Supreme Court granted certiorari in Hill v. Crosby, 546 U.S. 1158, 126 S. Ct. 1189 (2006), and almost 11 months after the Supreme Court clarified in Hill that inmates could file § 1983 challenges to a state's execution

procedures." Arthur at A21. Finally, the Eleventh Circuit noted that Arthur filed his late-filed claim "nine months after we had denied relief in his federal habeas action in August 2006." Arthur at A21-22. Arthur has never offered any legitimate reason why he waited until he was in the shadow of an execution date before he filed a lethal-injection challenge. The Eleventh Circuit ultimately concluded that "the district court did not abuse its discretion in dismissing Arthur's § 1983 action due to laches, especially given the strong presumption against the grant of equitable relief." Arthur at A23.

If Arthur had filed this lawsuit at such a time that "his claim could have been resolved on the merits without impacting his scheduled execution date" then his case would have been allowed to proceed. Arthur, 2007 WL 2320069 at *4. In Hill v. McDonough, 464 F.3d 1256, 1259 (11th Cir. 2006), cert. denied, 127 S. Ct. 465 (2006), and Rutherford v. McDonough, 466 F.3d 970, 973-74 (11th Cir.), cert. denied, 127 S. Ct. 465 (2006), and Diaz v. McDonough, 472 F.3d 849, 851 (11th Cir. 2006), cert. denied, 127 S. Ct. 851 (2006), and Jones v. Allen, 485 F.3d 635, 639 n.2 (11th Cir.), cert. denied, 127 S. Ct. 2160 (2007), and Grayson v. Allen, 491 F.3d 1318, 1326 (11th Cir. 2007, cert. denied, 2007 WL 2086662 (2007), and Williams v. Allen, __ F.3d __, 2007 WL 2368028 at *3 (11th Cir. 2007), stay denied, 2007 WL 2398491 (2007), the Eleventh Circuit ruled that the balance of the equities tips against the inmate if the claim could have been brought in time to permit full consideration of it without the need to stay the execution. Similarly, "[t]here was no justification for Arthur's failure to bring his lethal injection challenge earlier to allow sufficient time for full adjudication on the merits of this claim." Arthur at A23.

II. THE RELEVANT COURT OF APPEALS ALL CONSISTENTLY APPLY THIS COURT'S "TIMELINESS" REQUIREMENT ARTICULATED IN NELSON AND HILL

Arthur hopes to catch this Court's eye by alleging a circuit split. Pet. at 9-15. If a circuit split actually existed, of course, Arthur's tack would have been a reasonable one. See Sup. Ct. R. 10 (a). But none does. There is no circuit split regarding which "timeliness" requirement to employ in the stay context. This issue, verbatim as best we can tell, has now been raised to this Court several times in the last few months. See Grayson v. Allen, 07-5457, "Petition for Writ of Certiorari," pp. 7-14; Williams v. Allen, 07-6034. This Court denied certiorari, see Grayson v. Allen, 2007 WL 2086662 (July 26, 2007), and denied the stay in Williams, and should do likewise here.

Arthur makes two arguments to support his contention that a circuit split exists. First, Arthur alleges that the Fifth, Eighth, and Eleventh Circuits use an "unreasonable delay" requirement while the Ninth Circuit employs a "fact-specific inquiry." Pet. at 9-13. Second, Arthur contends that the Sixth Circuit ignores "equitable standards" and has adopted a statute-of-limitations rule. Pet. at 13-15. The State addresses each of these items in turn.

A. Arthur's Contention That The Ninth Circuit Does Not Employ A "Timeliness" Standard Is Incorrect

Arthur's petition contends a § 1983 lethal-injection challenge, even one that is filed with delay, will be adjudicated on the merits in the Ninth Circuit, but not in the Fifth, Sixth, Eighth, and Eleventh Circuits. As the following will demonstrate, Arthur is wrong.

In Beardslee v. Woodford, 395 F.3d 1064 (9th Cir. 2005), the very case mentioned in Arthur's petition, the Ninth Circuit applied a "timeliness" inquiry to deny a stay of execution. Id. at 1069-70. In fact, the Court stated: "To be sure, as the Supreme Court has instructed in Nelson and Gomez, the district court is entitled to take delay into consideration in exercising its equitable powers." Id. at 1069. The Beardslee Court did rule that the district court erred by applying a "general rule that a claim was dilatory if first filed at the time when the possibility of execution became imminent." Id. at 1070. Instead, courts should conduct "a fact-specific inquiry to ascertain whether the claims could have been brought earlier, and whether the petitioner had good cause for delay." Id.[6] In addition, in Cooper v. Rimmer, 379 F.3d 1029, 1032 (9th Cir. 2004), the Court affirmed the denial of a stay of execution because of "undue delay." Thus, the Ninth Circuit applies the same timeliness inquiry that was applied by the lower courts in this case.

Thus, contrary to Arthur's argument, the Ninth Circuit applies the same "timeliness" standard employed by the other courts of appeals to have addressed this issue. To be sure, the Eleventh Circuit and the district court did make findings, i.e., a "fact-specific inquiry," to demonstrate that Arthur could have raised his claim sooner and that his delay was unjustifiable. Arthur, A3-A10 (district court); Arthur, A19-A23 (Eleventh Circuit). Thus, there is no circuit split with the Ninth Circuit and this Court should deny certiorari and deny the stay application.

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[6] The Beardslee Court, despite stating that a "fact-specific inquiry to ascertain whether the claims could have been brought earlier [] and whether the petitioner had good cause for the delay," see Beardslee at 1070, engaged in no such inquiry.

B. This Court Should Not Grant Certiorari Because The Sixth Circuit Has Time-Barred a Lethal-Injection Challenge Based On The Statute of Limitations

The district court in this case did not address the State's motion to dismiss Williams's complaint on statute-of-limitations grounds. See Arthur at A3. The State did not raise the statute-of-limitations issue in its Eleventh Circuit brief. It is unclear why Arthur believes that certiorari should be granted on an issue that was not addressed by the district court and not raised in the Eleventh Circuit.

Recently, the Sixth Circuit, in Cooey v. Strickland, determined that a death row inmate's § 1983 method-of-execution challenge accrues for statute-of-limitation purposes at the conclusion of direct review – when the sentence becomes final – or when the State elects lethal injection as its method of execution. Cooey v. Strickland, 479 F.3d 412, 422 (6th Cir. March 2, 2007), rehearing denied, Cooey v. Strickland, __ F.3d __, 2007 WL 1574663 (6th Cir. June 1, 2007).[7] The Cooey case appears to be the only reported decision of a federal appeals court addressing the issue of when a death-row inmate's § 1983 method-of-execution challenge accrues for statue of limitation purposes. In a recent case, the Sixth Circuit applied the "timeliness" inquiry articulated in Nelson and Hill in denying a stay of execution. Workman v. Bredesen, 486 F.3d 896, 911 (6th Cir. 2007). The Court further stated that the claim was time-barred under either the majority or dissent's analysis in Cooey. Id. Thus, the Sixth Circuit did not have to apply the equitable standard used here.

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[7] A petition for certiorari filed by the plaintiff inmate in Cooey is pending. Cooey v. Strickland, 07-6234.

As previously stated, the district court did not address the statute-of-limitations issue and it was not raised in the Eleventh Circuit. Thus, the statute of limitations issue is not presented in this case and is not a reason for this Court to grant certiorari.

III. THIS COURT HAS REJECTED THE CONTENTION THAT METHOD-OF-EXECUTION CHALLENGES ARE RIPE ONLY AFTER THE CONCLUSION OF FEDERAL HABEAS REVIEW

Arthur filed his § 1983 action with unjustifiable delay by filing it approximately a month after the conclusion of federal habeas review. See Arthur at A2 (noting that this Court denied certiorari review on April 16, 2007, and that Arthur filed his § 1983 action on May 14, 2007). The district court stated that "[t]he Eleventh Circuit has declined to determine precisely when such a suit becomes ripe, but it has clearly rejected the notion that denial of certiorari is required." Arthur at 8. This Court, in Jones, Grayson, and Williams, has rejected requests for equitable relief that were filed at or near the conclusion of federal habeas review. This Court should do likewise here.

When Arthur filed his petition for writ of certiorari in this Court on January 11, 2007, it should have been clear to him that a denial of that petition would remove the final obstacle to a lifting of the state-court automatic stay of execution. See Alabama Rules of Appellate Procedure, Rule 8(d)(1).[8] It should have been equally clear that once the Alabama Supreme Court lifted the

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[8] The state-court automatic stay is in place until the death-row inmate exhausts his state and federal appeals. See Rule 8(d)(1), Ala. R. App. P.

automatic stay, Arthur might have as few as 30 days before the date of execution. Id. (requiring the date of execution to be "not less than 30 days" from the date of the order setting the execution date). At the time Arthur filed his petition for certiorari, therefore, he should have been aware, at the very least, that the likely execution of his sentence was rapidly approaching. Instead of diligently filing a method-of-execution claim, Arthur waited an additional four months to file his § 1983 action.

Any contention that a § 1983 action is premature and unripe until the conclusion of federal habeas review is off the mark. Because a § 1983 lawsuit and federal habeas corpus petition are mutually exclusive causes of action, there is no impediment to filing a § 1983 action while state or federal appeals are actively being pursued. See Nelson v. Campbell, 541 U.S. 637, 643 (2004); Hutcherson v. Riley, 468 F.3d 750, 754 (11th Cir. 2006). Issues that are not cognizable in habeas corpus are cognizable under § 1983. Parallel litigation thus poses no difficulty. There can be no serious contention that Arthur's lethal-injection claim is ripe only after this Court denies certiorari on federal habeas review. Arthur's lethal-injection claim was ripe in 2002 when Alabama changed its method of execution to lethal injection. If Arthur had filed his lethal-injection claim in 2006, when other Alabama inmates began filing their lethal-injection claims, his challenge would not have been dismissed on ripeness grounds.

In addition, allowing lethal-injection challenges to be litigated on the merits even if they are filed after the conclusion of federal habeas review would add years to a too lengthy appeals process. The validity of that conclusion should be obvious, but the State offers three recent examples. Danny Bradley filed a § 1983 action on June 26, 2001, at the conclusion of his federal post-

conviction appeals seeking DNA testing. See Bradley v. Nagle, 2:01-cv-01601-SLB (N.D. Ala.). After that complaint was dismissed, the Eleventh Circuit reversed – ruling that claims seeking post-conviction access to biological evidence for DNA testing purposes may be brought in a § 1983 action. Bradley v. Pryor, 305 F.3d 1287, 1290 (11th Cir. 2002). The federal district court recently entered a memorandum opinion denying relief and dismissing Bradley's lawsuit. Bradley v. Nagle, 2:01-cv-01601-SLB (N.D. Ala. March 29, 2007). Bradley has appealed the dismissal of his § 1983 action that was originally filed six years ago.

The second example is Darrell Grayson, who filed a § 1983 action on November 15, 2002, requesting DNA testing. Grayson v. Pryor, CV-02-BE-2800-S. Grayson's lawsuit was dismissed by the federal district court and rejected on appeal by the Eleventh Circuit and this Court. See Grayson v. King, 460 F.3d 1328 (11th Cir. 2006), cert. denied, Grayson v. King, 127 S.Ct. 1005 (Jan. 8, 2007). Grayson's § 1983 action delayed his execution by almost five years.

The last example is David Nelson, who filed a complaint on October 6, 2003, alleging that any use of a so-called "cut-down" procedure would be unconstitutional. Nelson v. Campbell, 2:03-cv-1008-MHT (M.D. Ala.). This Court ultimately reversed the lower courts, ruling that Nelson could challenge the "cut-down" procedure in a § 1983 action. See Nelson v. Campbell, 541 U.S. 637, 124 S.Ct. 2117 (2004). The case was subsequently remanded to the federal district court where it languishes to this day. Each of these three cases delayed an execution of a duly-adjudicated judgment.

Allowing as a matter of course the litigation of § 1983 actions after the conclusion of federal post-conviction will add years to the end of an already too long appeals

process. As previously stated, such a scenario is inconsistent with the requirement stated in Nelson and Hill for courts to determine whether equitable relief should be granted when the inmate unjustifiably delayed in filing the § 1983 action. In other words, an inmate is not automatically entitled to a stay of execution even when filing a § 1983 with unjustifiable delay. In addition, such a delay is inconsistent with the well-settled interest the State has in carrying out its duly-adjudicated judgment. As previously stated, the State's interest in meting out a sentence of death in a timely manner acquires "an added moral dimension" when post-trial proceedings have run their course. See Calderon v. Thompson, 523 U.S. 538, 556, 118 S.Ct. 1489 (1998).

Although this Court has not expressly determined when a method-of-execution becomes ripe, it has implicitly ruled that raising such a challenge after federal habeas proceedings is too late. In Gomez, this Court vacated a stay of execution because, among other reasons, the "claim could have been brought more than a decade ago." Gomez, 503 U.S. at 654, 112 S.Ct. 1652. The Gomez Court also ruled that "[e]quity must take into consideration the State's strong interest in proceeding with its judgment and Harris' obvious attempt at manipulation." Id. Thus, this Court has ruled that waiting until to the conclusion of federal habeas proceedings to file a method-of-execution challenge that has been available for years is too late.

Finally, it is telling that Arthur now attempts to leverage the "hydraulic pressure" of the combination of a late filing and a pending execution to his advantage, when he could have brought this claim years ago. Had Arthur filed this action within two years of his sentence being changed to lethal injection by operation of law, for example, none of these issues would have to be discussed.

The State filed its motion for an execution date at the appropriate time; it was Arthur who failed to bring his civil rights lawsuit at a time that would have allowed full consideration of his claims.

Arthur contends that Panetti v. Quarterman, __ U.S. __, 127 S.Ct. 2842 (2007), further supports his argument that his lethal-injection claim is not ripe until the end of his federal habeas appeals. In Panetti, this Court ruled, among other things, that the habeas petitioner's claim of incompetency to be executed was not barred by the prohibition against successive habeas petitions, see 28 U.S.C. § 2244, given that such a claim is not ripe until the petitioner's date of execution was set and there was the possibility that petitioner's mental capacity had recently further diminished. Id. at 11. The distinctions here should be obvious. First, a competency to be executed claim is naturally based on an inmate's present competency, thus such a claim is only ripe when execution is imminent. Second, Panetti deals with a claim that can be raised in a habeas petition and not a claim that only can be raised in a § 1983 action. See Nooner v. Norris, __ F.3d __, 2007 WL 1964649 at *4 (8th Cir. July 9, 2007) (ruling that Panetti is not applicable to § 1983 lethal-injection challenges).[9]

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[9] Arthur argues that Panetti further supports his appeal because of the Panetti Court's concern that requiring competency claims to be brought early would result in a wave of premature litigation. Here, Arthur argues, inmates may file their lethal-injection claims too early, only to have the results mooted if their sentence is overturned or if Alabama changes its method of execution. But if that was going to happen, it would be happening already. After the Eleventh Circuit's warnings against late-filed claims in Rutherford, Hill, Diaz, Jones, and Grayson, one would think that inmates who are not so far along in the appeal process would be rushing to file their suits. They are not.

On the other hand, Arthur has known since 2002 that he was going to be executed by lethal injection and likewise his opportunity to file a lawsuit challenging Alabama's execution procedures has been available since 2002. For the foregoing reasons, Panetti has no relevance to the issues presented here.

IV. THE DISTRICT COURT AND THE ELEVENTH CIRCUIT CORRECTLY RULED THAT THE BALANCE OF THE EQUITIES TILTS AGAINST ARTHUR

The Eleventh Circuit ruled that the balance of the equities weigh against Arthur because he unjustifiably delayed in filing his lethal-injection challenge. A19-23. Arthur does not contend that this ruling is erroneous. Instead, Arthur raises issues that he did not raise in the courts below.

First, Arthur contends that a stay should be granted because an Alabama legislative oversight committee recently approved a contract between the Alabama Attorney General's Office and Dr. Mark Dershwitz, a University of Massachusetts professor of anesthesiology. In that contract, Arthur contends that Dr. Dershwitz will "review the chemical composition of drugs" administered during a lethal injection. A30-A36 (the contract). Arthur asserts that Dr. Dershwitz will be making recommendations that will result in changes or improvements to Alabama's lethal-injection protocol. Arthur is wrong on his characterization of the contract.

As that contract plainly states, Dr. Dershwitz is employed as an expert witness by the State of Alabama in litigation involving lethal-injection claims brought by

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Instead, like Arthur, they all are waiting until the end of federal habeas review.

inmates. Dr. Derswhitz has prepared an affidavit that the State relied on in a previous case that concluded that "the administration of the medications as described above [i.e., the three-drug cocktail] will, beyond a reasonable degree of medical certainty, result in the rapid and painless death of the inmate." Grayson v. Allen, 2:06-cv-01032-WKW, "Defendants' Opposition To Grayson's Motion for a Stay of Execution" at p. 28. Indeed, Dr. Dershwitz's affidavit, among other things, led the district court in Grayson to rule that "Grayson cannot show a likelihood of success on the merits, much less a significant likelihood." Grayson, 2007 WL 1491009 at *12. Thus, Dr. Dershwitz's "review" has been completed and he has determined that the three-drug protocol will result in the "rapid and painless death of the inmate."

Second, Arthur contends that he should be granted a stay because of the trial that is scheduled for October 3-5, 2007, in the United States District Court for the Middle District of Alabama. See A26-29 (pretrial order in McNair v. Allen and Callahan v. Allen, 06-cv-695-WKW and 06-cv-919-WKW). However, the State has a pending summary judgment motion that will be discussed during a motions hearing that is scheduled for September 25, 2007, at 10:00 a.m., thus it is less than certain that this trial will even take place. The District Judge is expected to issue a ruling on the summary judgment motion this week.

Third, Arthur cites to a few cases that have held other States' execution protocols are deficient. The State responds by quoting from an opinion that considered evidentiary submissions regarding Alabama's execution procedures. The district court in Grayson, the same court hearing the McNair and Callahan cases, based on evidentiary submissions which it termed "substantial" stated the following:

> The court need not make that determination here because Grayson's allegations and evidentiary submissions (which have been substantial, though without the benefit of full discovery) fail to establish the likelihood of success on the merits and, consequently, any further need for a hearing, abridged or otherwise. Grayson's argument on the merits is entirely speculative: " *If* Mr. Grayson is not properly sedated, ... *if* the drugs are not properly prepared, ... *if* the drugs are not properly administered, or *if* the procedure is performed by individuals not properly trained and supervised, Mr. Grayson will suffer irreparable harm in the form of unnecessary and excruciating pain." (Doc. # 48, at 17-18) (emphasis added). What the evidence does *not* establish is relevant to this analysis: (1) any execution "mishap" in an Alabama lethal injection execution; (2) any cruel or unusual pain suffered by an inmate in an Alabama lethal injection execution; (3) any mishap in the delivery or injection of the three-drug mix in Alabama; or (4) any other compelling reason that suggests a substantial risk of cruel and unusual pain in future lethal injection executions in Alabama. Grayson's arguments, and the evidence upon which they are based, do not establish a significant likelihood of success on the merits.

Grayson at *12. None of the new issues raised for the first time in Arthur's petition for certiorari should be

considered. Even if they are, none offers a legitimate reason to grant a stay or to grant certiorari.

CONCLUSION

The petition for writ of certiorari to the [court below] should be granted.

Respectfully submitted,

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(9) No. 07-395
(Application No. 07A252)

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IN THE
Supreme Court of the United States

THOMAS D. ARTHUR,

Petitioner,

—*v.*—

RICHARD F. ALLEN,
Commissioner, Alabama Department of Corrections, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

PETITIONER'S SUPPLEMENTAL BRIEF IN FURTHER SUPPORT OF HIS PETITION FOR A WRIT OF CERTIORARI AND MOTION FOR A STAY

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September 25, 2007

In light of the fact that this Court granted a writ of certiorari today in *Baze* v. *Rees*, 07-5439, Petitioner Thomas Douglas Arthur files this Supplemental Brief in Further Support of his Petition for a Writ of Certiorari and Motion for a Stay of Execution.

ARGUMENT

This morning, the Supreme Court granted a writ of certiorari to the Kentucky Supreme Court in *Baze* v. *Rees*, 07-5439, to address the important constitutional questions raised in the petition for a writ, including, among others, the proper standard for determining whether a method of execution violates the Eighth Amendment to the United States Constitution. The answers to these questions could drastically change the procedures by which death-sentenced inmates are executed by lethal injection in the 37 states that currently use this method. Because the three-drug cocktail at issue in *Baze* v. *Rees* in Kentucky is identical to the three drug cocktail that Mr. Arthur understands is used in Alabama, this Court should grant Mr. Arthur's Petition for a Writ of Certiorari, as well as his Motion for a Stay of Execution pending this Court's decision regarding the proper standard for determining the constitutionality of lethal injection.

I. The Equities Militate in Favor of a Stay

The issues at stake here are unquestionably important to Mr. Arthur, who stands to be executed pursuant to a protocol that he believes will result in an excruciatingly painful death – as confirmed by numerous courts. *See, e.g.*, *Harbison* v. *Little*, No.

3:06-CV-01206 (M.D. Tenn. Sept. 19, 2007) (finding Tennessee's lethal injection protocol in violation of the Eighth Amendment); *Morales* v. *Hickman*, 415 F. Supp. 2d 1037, 1046-48 (N.D. Cal. 2006). Not since 1879 has this Court addressed on the merits a constitutional test over a method of execution. *See Wilkerson* v. *Utah*, 99 U.S. 130 (1878) (execution by firing squad is not unconstitutional). The number of lethal injection challenges percolating in the state and federal courts across the country demonstrates the real need for this Court to provide some guidance on the appropriate standard of review. Until this Court answers the questions presented in *Baze* v. *Rees* and determines the constitutionality of a particular means for effecting the ultimate punishment, it is unconscionable for states to continue with executions by lethal injection.

Although the Kentucky Supreme Court held that Kentucky's lethal injection procedure, which is apparently identical to Alabama's, does pass muster under the Eighth Amendment to the United States Constitution, this Court's clarification of the appropriate standard of review could alter that holding, as well as many other similar holdings around the country. *See, e.g.*, *Walker* v. *Johnson*, 448 F. Supp. 2d 719, 723 (E.D. Va. 2006). Executing Mr. Arthur two days after this Court granted certiorari in *Baze* v. *Rees* and one week before the issue of the constitutionality of Alabama's lethal injection protocol proceeds to trial in the United States District Court for the Middle District of Alabama flies in the face of both fairness and common sense. Without a stay, if this Court – or the Alabama district court – were to determine that

lethal injection as practiced around the country or in Alabama is unconstitutional, Mr. Arthur will have been executed in violation of the Eighth Amendment. There is no clearer example of irreparable harm. It is only through a stay that Mr. Arthur can be afforded the protections this Court may determine are required under the United States Constitution.

II. Mr. Arthur's Claim Has a Strong Likelihood of Success on the Merits

Mr. Arthur has demonstrated – and can demonstrate further with discovery – a strong likelihood that Alabama's lethal injection protocol requires modifications in order to pass constitutional muster. As set forth in Mr. Arthur's Petition, courts around the nation have granted a variety of forms of relief on similar claims brought by death row inmates, and this Court's grant of certiorari in *Baze* v. *Rees* will provide much needed guidance for future decisions. As also set forth in Mr. Arthur's Petition, lethal injection is currently or was previously suspended in California, Delaware, Florida, Maryland, Missouri, North Carolina, South Dakota and Tennessee. With appropriate guidance from this Court, Mr. Arthur and other similarly situated petitioners, will not only be able to demonstrate that lethal injection as practiced in Alabama and in other states is unconstitutional, but with the help of experts, they will be able to prescribe painless methods of execution that will meet minimum constitutional standards.

CONCLUSION

Based on the additional development of this Court's grant of a writ of certiorari in *Baze* v. *Rees*, along with the reasons expressed in Mr. Arthur's Petition for a Writ of Certiorari, Mr. Arthur respectfully urges this Court to grant his Petition and his Motion for Stay of Execution.

Respectfully submitted,

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September 25, 2007

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(5)

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Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

PETITIONER'S SECOND SUPPLEMENTAL BRIEF IN FURTHER SUPPORT OF HIS PETITION FOR A WRIT OF CERTIORARI AND MOTION FOR A STAY

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September 26, 2007

The State of Alabama has now decided to change its lethal injection protocol in an attempt to comply with the minimum standards set forth in the Eighth Amendment to the United States Constitution. The State, however, still plans to execute Thomas Douglas Arthur on September 27, 2007 before any of these changes have been implemented. In light of these new facts, Mr. Arthur files this Second Supplemental Brief in Further Support of his Petition for a Writ of Certiorari and Motion for a Stay of Execution.

FACTUAL BACKGROUND

This morning, Mr. Arthur's counsel received a telephone call from Scott Rouse, deputy legal advisor to the Governor of Alabama, Bob Riley. Mr. Rouse informed counsel that in connection with *McNair* v. *Allen*, 06-cv-00695, a lethal injection litigation currently pending in the United States District Court for the Middle District of Alabama, the State of Alabama has decided to make changes to its lethal injection protocol. According to Mr. Rouse, the State of Alabama plans to conduct "an assessment of consciousness" after administration of the first drug of a three-drug cocktail but has not yet decided who will conduct the "assessment of consciousness"—Department of Correction officers, the Warden or emergency medical technicians. According to Mr. Rouse, the State of Alabama is also considering other changes to its protocol. Nevertheless, the State of Alabama intends to execute Mr. Arthur on September 27 pursuant to its current lethal injection protocol, and Governor Riley has refused to stay the execution pending implementation of the changes to

such protocol. Mr. Arthur's counsel also spoke with Anne Adams today, counsel for the Alabama Department of Corrections, who confirmed the information provided by Mr. Rouse this morning. Mr. Arthur's counsel understands that the State of Alabama has been considering these changes for the past few days, during which attorneys from the Attorney General's Office have continued to argue that Mr. Arthur cannot succeed on the merits in his own challenge to Alabama's lethal injection protocol.

ARGUMENT

Yesterday, the Supreme Court granted a writ of certiorari to the Kentucky Supreme Court in *Baze* v. *Rees*, 07-5439, to address the important constitutional questions raised in the petition for a writ, including, among others, the proper standard for determining whether a method of execution violates the Eighth Amendment to the United States Constitution.

Today, Mr. Arthur's counsel learned that the State of Alabama will join the long list of states that are making changes to their lethal injection protocols. (*See* Mr. Arthur's Petition for Writ of Certiorari at 24-27.) Although the State of Alabama insists that Mr. Arthur has failed to demonstrate a likelihood of success on the merits of his challenge to the State's lethal injection protocol, the State's decision to change its protocol is an implicit concession that such protocol violates the United States Constitution. Without a stay, Mr. Arthur runs the grave risk of being subjected to cruel and unusual punishment. The State of Alabama has no basis to argue that it will be prejudiced by staying

Mr. Arthur's execution until its new protocol can be applied.

CONCLUSION

Based on Alabama's expressed intent to change its lethal injection protocol, along with the reasons expressed in Mr. Arthur's Petition for a Writ of Certiorari, Mr. Arthur respectfully urges this Court to grant his Petition and his Motion for Stay of Execution.

Respectfully submitted,

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September 26, 2007

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No. 07-395
(Application No. 07A252)
CAPITAL CASE

In the
SUPREME COURT OF THE UNITED STATES

THOMAS D. ARTHUR,

Petitioner,

v.

RICHARD F. ALLEN, ET AL.,

Respondents.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Eleventh Circuit

RESPONDENTS' REPLY TO PETITIONER'S SECOND SUPPLEMENTAL BRIEF

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RESPONDENT'S REPLY TO PETITIONER'S SECOND SUPPLEMENTAL BRIEF

(Capital Case)
(Execution Scheduled for September 27, 2007 at 6:00 p.m. CDT)

Thomas Arthur filed a second supplemental brief earlier today in further support of his petition for certiorari and request for a stay. The brief is based on telephone conversations Arthur's counsel had with Scott Rouse, deputy legal advisor to the Governor of Alabama, and with Anne Adams, Executive Assistant to the Commissioner of the Alabama Department of Corrections. The respondent offers this brief reply.

Anne Adams has prepared an affidavit, that is attached as Exhibit A, to correct some of the misinformation contained in Arthur's second supplemental brief. First, Ms. Adams did tell Arthur's counsel that the Alabama Department of Corrections is making a minor modification to its execution protocol. Ms. Adams testifies as follows:

> I then went on to tell Ms. Han that in another legal matter the Department of Corrections has committed to adding an additional safeguard to our protocol. The additional safeguard will be that after the administration of the first drug in the current protocol, sodium pentathol, someone will be tasked with assessing the consciousness of the condemned.

Exhibit at ¶ 3. Contrary to Arthur's brief to this Court, Ms. Adams did not tell Arthur's counsel that Alabama's present execution procedures are unconstitutional. Id.

Arthur's counsel was informed of this minor modification because it was the Department of Corrections' ethical obligation to inform her of the change

that is to be made in the future. Id. ¶ 4. Arthur's counsel was also informed that "logistically it would be impossible for us to implement this change by tomorrow [Arthur's scheduled execution date]. Id. at ¶ 6.

Ms. Adams disputes that she "confirmed" information provided by the Governor's deputy legal advisor to Arthur's counsel because Ms. Adams is unaware of the subject matter of their call. Id. at ¶ 10. Ms. Adams states further that "[d]espite Ms. Han's contention to the contrary, the Department of Corrections is NOT adding this additional safeguard to its protocol 'in an attempt to comply with the minimum standards set forth in the Eighth Amendment to the United States Constitution.'" Id. at ¶ 11 (quoting Arthur's second supplemental brief at p. 1). Finally, Ms. Adams told Arthur's counsel that:

> ...the Warden at all times during the execution is assessing consciousness, to the extent he is watching the inmate, looking for any indication the inmate may be conscious. The additional safeguard we plan to add will simply take that assessment one step further by having someone in the chamber with the condemned to assess consciousness.

Id. at 11.

For the foregoing reasons, and those stated in the State's previous filings, the respondent requests that this Court deny Arthur's petition for certiorari and stay application.

Respectfully submitted,

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AFFIDAVIT OF ANNE C. ADAMS

I, Anne C. Adams, do solemnly swear to the following facts:

1. I am an Assistant Attorney General presently employed with the Alabama Department of Corrections as Special Counsel to the Commissioner. I have been employed in that capacity since March, 2006. Before I was appointed Special Counsel to the Commissioner, I served as an Assistant Attorney General in the Alabama Attorney General's Office.

2. This morning I spoke with Suhana Han, counsel for Arthur. I began our conversation by stating that the Department of Corrections stands behind its current execution protocol and is confident that, as it is currently written, the protocol is constitutional. At no time did I concede "that such protocol violates the United States Constitution," as Ms. Han suggests on page 3 of Arthur's most recent filing. In fact, I deliberately began our conversation with my strong statement to the contrary.

3. I then went on to tell Ms. Han that in another legal matter the Department of Corrections has committed to adding an additional safeguard to our protocol. The additional safeguard will be that after the administration of the first drug in the current protocol, sodium pentathol, someone will be tasked with assessing the consciousness of the condemned.

4. I further indicated that there may or may not be additional safeguards added but that the only reason I called her was to tell her that the Department is committed to adding the additional step to assess consciousness and felt we had an ethical obligation to inform her as such.

5. Ms. Han asked me if the other matter I was referring to was the McNair case and if attorneys from the Office of the Attorney General were involved. I responded that while the McNair case is currently in litigation, the addition of the step to assess consciousness was made by this Department. I further reminded her that the purpose of my call was solely to notify her, as a representative of the Department of Corrections, of the Department's decision to add this additional safeguard to its protocol and that I did not call to discuss, nor was I authorized to discuss, ANY litigation matters - reminding her the litigation in all of these cases is being handled by the Office of the Attorney General.

6. Ms. Han then further stated that she assumed we were not going to make this change to our protocol for Mr. Arthur. My response was simply that logistically it would be impossible for us to implement this change by tomorrow.

7. Ms. Han then went on to say that she assumed Arthur was not going to get a stay. Again, I told her I had no way of knowing that and could not discuss litigation matters with her. Again, stating the limited purpose for my call.

8. Ms. Han further asked me if the Department intended to issue a press release regarding the addition of the safeguard to assess consciousness and I told her that, to my knowledge, the answer was no.

9. I concluded my call with Ms. Han by restating the limited purpose of my call -notification of the Department's intent to add an additional safeguard to assess consciousness.

10. While it is clear from Arthur's most recent filing that Ms. Han had spoken to Scott Rouse, Deputy Legal Advisor to the Governor, before speaking with me, she never told me they had spoken much less what they discussed. Yet on page 2 of Arthur's most recent filing, Ms. Han states that I "confirmed the information provided by Mr. Rouse." Not only is that untrue as a matter of fact, there are details she includes in her recounting of her conversation with Mr. Rouse that I never discussed with her - for example a list of prospects for conducting the assessment of consciousness - and, in one instance, specifically stated I would not discuss - other matters currently in litigation.

11. Despite Ms. Han's contention to the contrary, the Department of Corrections is NOT adding this additional safeguard to its protocol "in an attempt to comply with the minimum standards set forth in the Eighth Amendment to the United States Constitution." (Arthur's filing, page 1) This Department is confident that its current protocol is constitutional and I never said anything to suggest to the contrary. I would further note that, as part of the current protocol, the Warden at all times during the execution is assessing consciousness, to the extent he is watching the inmate, looking for any indication the inmate may be conscious. The additional safeguard we plan to add will simply take that assessment one step further by having someone in the chamber with the condemned to assess consciousness.

I declare under penalty of perjury that the foregoing is true and correct.

EXECUTED on this 26th day of September, 2007.

s/ Anne C. Adams

Sworn to and subscribed before me, the undersigned notary public, on this the 26th day of September, 2007, in Montgomery County, Alabama.

s/ Kay P. Hope

My commission expires : 3/31/08

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(7)

FILED
SEP 26 2007
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 07-395
(Application No. 07A252)
CAPITAL CASE

In the
SUPREME COURT OF THE UNITED STATES

THOMAS D. ARTHUR,

Petitioner,

v.

RICHARD F. ALLEN, ET AL.,

Respondents.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Eleventh Circuit

RESPONDENTS' REPLY TO PETITIONER'S SUPPLEMENTAL BRIEF

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RESPONDENT'S REPLY TO PETITIONER'S SUPPLEMENTAL BRIEF

Thomas Arthur, presently set for execution on September 27, 2007, at 6:00 p.m., filed a supplement brief based on this Court's grant of certiorari in Baze v. Rees, 07-5439. Contrary to Arthur's assertions, this Court's grant of certiorari review in Baze v. Rees, 07-5439, does not necessitate the grant of a stay in Arthur's case. First, the certiorari grant in Baze is specifically constrained to cases where no execution is pending. The petitioner's questions presented actually note the absence of a scheduled execution date in that case. Second, the Baze case is unencumbered by any of the procedural hurdles present in Arthur's case. The Eleventh Circuit ruled that "[i]n considering the dismissal of a lethal injection challenge, courts are to apply equitable principles which mandate dismissal when the plaintiff 'delayed unnecessarily in bringing the claim, ... knowing full well that the discovery, evidentiary hearing, and decision on the merits that he demands could not possibly be accomplished' within the short period of time between filing and the scheduled execution date." Arthur, at A19 (quoting Rutherford v. McDonough, 466 F.3d 970 (11th Cir. 2006)(quoting Hill v. McDonough, __ U.S. __, 126 S. Ct. 2096, 2104 (2006). The Eleventh Circuit then held that the balance of the equities tips against Arthur because, among other things, "Arthur was on notice that a challenge to Alabama's method-of-execution was available under § 1983 as early as June 2006, as a result of the Supreme Court's decision in Hill, or August 2006, as a result of other filed Alabama actions." Arthur at A22-A23. Baze involved a direct challenge to the Kentucky protocol through the state courts, it was timely, and it was not filed with unjustifiable delay. Third, and most significantly, the issue on which the Court granted review in Baze appears to be related to the standard to be used when assessing method-of-execution claims on the merits. Conversely, that issue is not presented here because

Arthur did not make any evidentiary submission to the federal district court. Thus, the lower courts did not grapple with which standard to apply. Thus, Arthur's case falls outside the purview of the Court's grant of certiorari in Baze. Indeed, it is no different from any other late-filed challenge to an execution. It is dilatory and it does not justify the granting of a stay of execution.

Respectfully submitted,

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(3)

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No. 07-395

IN THE
Supreme Court of the United States

THOMAS D. ARTHUR,

Petitioner,

—*v.*—

RICHARD F. ALLEN,
Commissioner, Alabama Department of Corrections, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

PETITIONER'S REPLY TO BRIEF IN OPPOSITION

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October 4, 2007

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In granting certiorari in *Baze* v. *Rees*, 217 S.W.3d 307 (Ky. 2006), *cert. granted*, 2007 U.S. LEXIS 9066 (U.S. Sept. 25, 2007) (No. 07-5439), the United States Supreme Court will determine the proper legal standard for assessing the constitutionality of a method of execution. As noted by the petitioner in *Baze*, courts have applied inconsistent legal standards in assessing whether a particular lethal injection protocol constitutes cruel and unusual punishment. Courts have also applied inconsistent legal standards in assessing whether a complaint challenging lethal injection was timely filed. The Fifth, Sixth, Eighth, Ninth and Eleventh Circuits have adopted conflicting tests resulting in a patchwork of stays and dismissals in lethal injection cases across the country.

Like the standard for determining the constitutionality of lethal injection, the standard for determining the timeliness of a lethal injection complaint needs to be clearly established to ensure that critical questions are not decided on the basis of where a complaint was filed. The Court should grant Mr. Arthur's Petition and decide this threshold issue of timeliness. The Court should also remand Mr. Arthur's Complaint so that it may be litigated on the merits.

SUPPLEMENTAL STATEMENT OF THE CASE

Since Mr. Arthur submitted his Petition for Writ of Certiorari and Motion for a Stay of Execution on September 21, 2007, new developments have occurred that bear directly on Mr. Arthur's Petition.

On September 25, 2007, the United States Supreme Court granted certiorari in *Baze* v. *Rees*, which challenges lethal injection procedures in Kentucky. Alabama apparently uses the same three-drug cocktail as Kentucky. In light of *Baze*, on September 25, 2007, Mr. Arthur filed a supplemental brief with the Supreme Court in further support of his Petition and motion seeking a stay of execution.

On September 26, 2007, Mr. Arthur's counsel received a telephone call from Scott Rouse, deputy legal advisor to the Governor of Alabama, Bob Riley. Mr. Rouse informed counsel that in connection with *McNair* v. *Allen*, 2:06-cv-00695 (M.D. Ala. 2007),[1] a lethal injection case currently pending in the United States District Court for the Middle District of Alabama, the State of Alabama has decided to make changes to its lethal injection protocol. The Governor, however, refused to stay Mr. Arthur's execution pending implementation of any changes and planned to proceed with Mr. Arthur's execution on September 27 pursuant to Alabama's current lethal injection protocol. In light of this development, Mr. Arthur filed a second supplemental brief with the Supreme Court in further support of his Petition and motion seeking a stay of execution.

On September 27, 2007, before the Supreme Court ruled on Mr. Arthur's motion for a stay, the Governor of Alabama granted Mr. Arthur a 45-day reprieve from his execution scheduled for that day "to allow the Department of Corrections sufficient

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[1] *McNair* was consolidated with *Callahan* v. *Allen*, 2:06-cv-00919 (M.D. Ala. 2007) on November 28, 2006.

time to make modifications to its lethal injection protocol." (A1)

According to Jeff Emerson, communications director for Governor Riley, the Governor's decision to change Alabama's protocol came on the heels of a recent ruling by a federal judge that Tennessee's lethal injection protocol is unconstitutional. *See* Stan Diel, *Riley Delays Arthur's Execution*, BIRMINGHAM NEWS, Sept. 28, 2007. After a bench trial, Judge Trauger of the United States District Court for the Middle District of Tennessee held that Tennessee's revised lethal injection protocol violates the Eighth Amendment. *See Harbison* v. *Little*, No 3:06-01206, 2007 U.S. Dist. LEXIS 72410 (M.D. Tenn. Sept. 19, 2007). As acknowledged by Jeff Emerson, "[Tennessee's] protocol is very similar to what Alabama does." Phillip Rawls, *Alabama Changing Lethal Injection Procedure*, JACKSONVILLE NEWS, Sept. 26, 2007.

On September 28, 2007, the district court in *McNair* v. *Allen* issued an order tentatively scheduling trial for the week of November 26, 2007. (A3-A4) In light of Alabama's plans to change its lethal injection protocol, the trial, originally scheduled for October 3, was postponed. During this trial in the Middle District of Alabama, the parties will present evidence, including testimony by experts, and a federal court will examine the constitutionality of Alabama's lethal injection protocol and any subsequent revisions implemented by the State.

On September 28, 2007, the State of Alabama moved the Supreme Court of Alabama to set an

execution date of November 15, 2007 for Mr. Arthur. The State of Alabama seeks to execute Mr. Arthur before this Court issues a decision in *Baze* and before the *McNair* trial commences.

ARGUMENT

I. The Circuit Courts Have Adopted Different Tests for Determining the Timeliness of a § 1983 Lethal Injection Complaint.

In its opposition, the State of Alabama maintains that "[t]here is no circuit split regarding which 'timeliness' requirement to employ in the stay context." (Opp. at 18.) The State is wrong.

The Sixth Circuit's test for measuring the timeliness of a § 1983 lethal injection complaint conflicts with the equitable standards adopted by the Fifth, Eighth, Ninth, and Eleventh Circuits. Under the Sixth Circuit's statute-of-limitations rule, an inmate's lethal injection claim accrues upon the conclusion of his direct appeal of his conviction. *See Cooey* v. *Strickland*, 479 F.3d 412, 422 (6th Cir. 2007). This rule requires death-sentenced inmates to litigate simultaneously habeas petitions attacking the validity of their conviction and sentence, and actions challenging the constitutionality of the procedure used to carry out the sentence.

The State of Alabama does not dispute that the Sixth Circuit's rule for measuring timeliness has created a circuit split. The State argues instead that "the district court did not address the statute-of-limitations issue and it was not raised in the Eleventh Circuit," and therefore such issue is not properly before the Court. (Opp. at 22-23.) This

argument is frivolous. Mr. Arthur is not directly challenging the propriety of the Sixth Circuit's rule, because the Eleventh Circuit applied a different test in finding his Complaint untimely filed. The fact that the Sixth Circuit's rule was not applied against him, however, does not bar Mr. Arthur from pointing out that such rule is inconsistent with tests adopted by other circuits—a significant factor favoring certiorari review. By its very nature, a circuit split means that courts in other jurisdictions have applied a test that is different than that applied in the case at hand. Consequently, it makes no sense to require a petitioner to challenge in the courts below the tests applied in other circuits before presenting such circuit split to the Supreme Court. The State of Alabama's nonsensical argument should be rejected.

Not only is there a conflict between a statute-of-limitations rule and an equitable standard for measuring timeliness, the courts of appeal that have applied the latter also disagree on the presumption that should attach to such standard. Unlike the Ninth Circuit, the Fifth, Eighth and Eleventh Circuits have adopted an irrebuttable "equitable presumption."

The State of Alabama nevertheless insists that the Ninth Circuit "applies the same 'timeliness' standard employed by the other courts of appeals" (Opp. at 20-21) in determining whether a death-sentenced inmate unreasonably delayed in bringing his lethal injection action. The two cases cited by the State, however, belie this assertion. In *Beardslee* v. *Woodford*, 395 F.3d 1064 (9th Cir. 2005), the Ninth Circuit held that "the district court should have conducted a fact-specific inquiry to ascertain whether

the claims could have been brought earlier, and whether the petitioner had good cause for delay." *Id.* at 1070. The Ninth Circuit expressly rejected the district court's application of "a general rule that a claim was dilatory if first filed at the time when the possibility of execution became imminent." *Id.*

In *Cooper* v. *Rimmer*, 379 F.3d 1029 (9th Cir. 2004), the Ninth Circuit affirmed the dismissal of a lethal injection complaint filed by an inmate eight days before his scheduled execution. Before concluding that the plaintiff "had brought his challenge at the eleventh hour," the district court held a hearing to examine, among other things, "factual circumstances" and the likelihood of success on the merits. *Id.* at 1031.

Under the Ninth Circuit's standard for determining timeliness, the "strong equitable presumption against the grant of a stay" is not irrebuttable, and courts should engage in fact-specific inquiries, including whether a plaintiff "acted promptly" and "pursued his claims aggressively as soon as he viewed them as ripe." *Beardslee*, 395 F.3d at 1069.

In contrast, under the Eleventh Circuit's standard, the "strong equitable presumption against the grant of a stay" is essentially irrebuttable. (A20) Even if Mr. Arthur could show that he "had brought his suit in time to allow consideration of the merits," the Eleventh Circuit concluded that "the strong presumption against a stay [would have] operate[d] against him." (Pet. at A21) Instead of engaging in a fact-specific inquiry in assessing Mr. Arthur's Complaint, the district court found "prejudice as a

matter of law" (Pet. at A11-A12), and both courts below failed to consider whether the likelihood of success of Mr. Arthur's claims on the merits could overcome the "strong equitable presumption." Without any inquiry into the merits, the Eleventh Circuit (along with the Fifth and Eighth Circuits) has assumed the intolerable risk of permitting the unconstitutional execution of inmates pursuant to "equitable standards" that do not even specify when a method-of-execution claim becomes ripe.

Indeed, recent events in this case highlight the fundamental flaw in the Eleventh Circuit's standard for timeliness, which fails to recognize that a method-of-execution complaint raises an Eighth Amendment challenge to a future injury that will occur only *at the time of execution.* According to the State, Mr. Arthur should have brought his complaint in 2002 when Alabama changed its method of execution to lethal injection. (Opp. at 25.) Any judgment regarding the constitutionality of the protocol at that time, however, would be irrelevant now because Alabama decided to change its protocol *one day* before Mr. Arthur's scheduled execution. The Eleventh Circuit's "unreasonable delay" standard thus compels death row inmates to litigate method-of-execution claims before they are certain that they will be executed and before the actual protocol to be used is even determined.

In sum, the circuit courts throughout the country have adopted inconsistent measures for determining the timeliness of a § 1983 lethal injection complaint. The Sixth Circuit has adopted a statute-of-limitations rule that calculates the period from the conclusion of direct review to the date on

which the lethal injection complaint is filed. The equitable standard relying on an irrebuttable presumption adopted by the Fifth, Eighth and Eleventh Circuits is based upon the amount of time that remains before an inmate will be executed—a date that is subject to change and uncertainty. And the Ninth Circuit has adopted an equitable standard focusing on fact-specific inquiries, including whether a death row inmate pursued his claims aggressively as soon as he viewed them as ripe. Under the current state of the law, the outcome of lethal injection challenges brought by similarly situated death row inmates depends upon where the complaint was filed. This Court should grant certiorari to determine the proper measure for timeliness.

II. Recent Developments Confirm that Mr. Arthur's Challenge to Alabama's Lethal Injection Protocol Warrants Substantive Review.

In an attempt to discount the relevance of recent developments bearing on the merits of Mr. Arthur's Complaint, the State of Alabama argues that such developments were not presented to the Eleventh Circuit. (Opp. at 30.) Such a disingenuous argument ignores the fact that the developments occurred after Mr. Arthur had submitted his appellate brief. These developments confirm that Mr. Arthur should be afforded the opportunity to challenge Alabama's lethal injection protocol.

The State of Alabama has acknowledged that its current lethal injection protocol is substantially the same as Tennessee's protocol. *See* Phillip Rawls,

Alabama Changing Lethal Injection Procedure, JACKSONVILLE NEWS, Sept. 26, 2007 ("[Tennessee's] protocol is very similar to what Alabama does."). The very protocol that Alabama considers comparable to its own, however, has been found to be unconstitutional. After a bench trial, Judge Trauger of the United States District Court for the Middle District of Tennessee held that Tennessee's revised lethal injection protocol violates the Eighth Amendment. *See Harbison* v. *Little*, No 3:06-012016, 2007 U.S. Dist. LEXIS 72410 (M.D. Tenn. Sept. 19, 2007). Alabama's decision to change its protocol came on the heels of this ruling regarding Tennessee's lethal injection protocol. *See* Stan Diel, *Riley Delays Arthur's Execution*, BIRMINGHAM NEWS, Sept. 28, 2007.

In an apparent attempt to comply with the minimum standards required by the Eighth Amendment, the State of Alabama plans to conduct "an assessment of consciousness" after administration of the first drug of a three-drug cocktail—the same cocktail at issue in *Baze*. The State, however, has not yet decided who will conduct the "assessment of consciousness"—Department of Correction officers, the Warden or emergency medical technicians—or what such assessment will entail. Questions about the constitutionality of Alabama's lethal injection protocol remain unanswered.

In the upcoming trial of *McNair* v. *Allen*, a federal judge will resolve for the first time the constitutionality of the lethal injection protocol as applied in Alabama. With the benefit of the factual exposition of the *McNair* plaintiffs' claims at hand,

resolution of Mr. Arthur's substantially similar claims will likely be able to proceed quickly.

These recent developments highlight the importance of allowing Mr. Arthur to litigate the merits of his Complaint before he is executed by the very method that he challenges as unconstitutional. Mr. Arthur has demonstrated a strong likelihood of success in showing that Alabama's lethal injection protocol requires modifications in order to pass constitutional muster. As set forth in Mr. Arthur's Petition, courts around the nation have granted a variety of forms of relief on similar claims brought by death row inmates. (Pet. at 24-27.)

CONCLUSION

For the foregoing reasons and the reasons set forth in Mr. Arthur's Petition, the Court should grant a writ of certiorari and reverse the decision of the Court of Appeals for the Eleventh Circuit with respect to the questions presented herein.

Respectfully submitted,

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October 4, 2007

APPENDIX

STATE OF ALABAMA

September 27, 2007

Mr. Richard F. Allen, Commissioner
Alabama Department of Corrections
AL Criminal Justice Complex
301 South Ripley Street
Montgomery, Alabama 36130

Dear Commissioner Allen:

By my authority under Amendment 38 to the Alabama Constitution, I hereby grant a reprieve of 45 days to Thomas D. Arthur, who is scheduled for execution on this date. The sole purpose of this reprieve is to allow the Alabama Department of Corrections sufficient time to make modifications to its lethal injection protocol. It is my desire that the Alabama Attorney General will make a motion for, and that the Alabama Supreme Court will promptly set, a new date of execution at the expiration of this 45-day period.

Sincerely,

Bob Riley
Governor

BR/rdg

cc: United States Supreme Court
Alabama Supreme Court

Alabama Attorney General Troy King
Suhana S. Han, Esquire

IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF ALABAMA NORTHERN DIVISION

WILLIE MCNAIR, Plaintiff/Counter-Defendant, v. RICHARD ALLEN, *et al.*, Defendants/Counter-Plaintiffs.	)	CASE NO. 2:06-cv-00695-WKW

JAMES CALLAHAN, Plaintiff/Counter-Defendant, v. RICHARD ALLEN, *et al.*, Defendants/Counter-Plaintiffs.	)	CASE NO. 2:06-cv-00919-WKW

ORDER

It is ORDERED that the trial of this matter and all other dates and deadlines are CONTINUED. The trial is tentatively set for the week of November 26, 2007. A telephone status conference, to be arranged by the defendants, is SET for **October 31,**

2007, at 4:00 p.m. (CDT), at which other pretrial dates and deadlines will be discussed.

DONE this 28th day of September, 2007.

/s/ W. Keith Watkins
UNITED STATES
DISTRICT JUDGE